

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX
FOR APPELLANT**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8357

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED DEC 24 1942

JOHN T. HENKEL, *Appellant,*

v.

JOHN E. VARNER, *Appellee.*

Joseph W. Stewart
CLERK

**Appeal from the District Court of the United States
for the District of Columbia.**

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Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the District of Columbia, on a verdict in the sum of \$7,500.00 in favor of the plaintiff John E. Varner in Civil Action No. 7031 (Appellant's App. 8), from which the defendant, John T. Henkel, noted an appeal (Appellant's App. 14).

The jurisdiction of the trial court is based on Sec. 61, Code of Law for the District of Columbia, 1901 (Title 11, Sec. 305, District of Columbia Code 1940).

The jurisdiction of this Court is based on Sec. 226, Code of Law for the District of Columbia, 1901 (Title 17, Sec. 101, District of Columbia Code, 1940).

STATEMENT OF THE CASE.

Appellant John T. Henkel (hereinafter called the defendant) was the owner of an apartment building at No. 133 Webster Street, N. W., Washington, D. C.

In October, 1939, Appellee, John E. Varner (hereinafter called plaintiff), was a tenant of apartment No. 4, and occupied the same with his wife and two children. H. L. Rust Company was the rental agent. (Appellant's App. 17-19, 35-36) Mrs. Virginia Gregory was manager of the building; Albert Branham was the janitor and did various jobs about the premises, including replacing of washers on faucets (Appellant's App. 18-19, 53, 80, 98).

In October, 1939, the bathtub faucet in said apartment was dripping, and either plaintiff or his wife asked that it be fixed. Mrs. Gregory, on Thursday, October 19, 1939, told a plumber, working in another apartment in the building, to fix the spigots in the Varner apartment when he finished the job he was on. He did not finish his job that day and did not go to the Varner apartment. On the following day, Friday, October 20, 1939, the plumber did not return so Mrs. Gregory told Branham, who had always fixed the spigots in the Varner apartment, to "fix it"; he told her he was out of washers. She did not have one, and at her direction he went to a steam fitter, working that day on the hot-water boiler in the basement, and got a washer; he went to the Varner apartment, found the faucet in the tub was dripping, and by holding his hand under the outlet found it was the cold water that was dripping; he cut off the cold water at the cut off valve, and put the washer on the cold water faucet. It was a small, flat, black, round

washer. Both hot water faucet and cold water faucet worked easily, turned easily, and were all right when he left the apartment. He did no work on the handles or on the hot water faucet, or on any part of the fixture except to replace the washer on the cold-water faucet. He reported to Mrs. Gregory that he fixed it; that it was still leaking a little, but that it would take up. (Appellant's App. 18-19, 42, 81-83, 96, 98-99.)

Plaintiff testified that on Sunday morning, October 22, 1939, some time between 6:30 and 9 o'clock, he went into the bathroom, sat on the commode, which is at the end of the bath-tub, reached out with his right hand to the bath tub, turned on the cold water, and then got hold of the hot water faucet and turned it on, using the same pressure he always used (Appellant's App. 39, 40, 54-55), and the porcelain handle broke in his hand (Appellant's App. 37, 55-56), cutting his palm below the ring finger, and causing injuries which resulted in the surgical removal of two joints of his right ring finger. (Appellant's App. 34, 37-40, 43, 53-56.)

On Monday, October 23, 1939, at Mrs. Gregory's instruction, the plumber, Albert Rhodes, reground the valve seats of both faucets of the fixture, put new washers on each faucet and put a new porcelain handle, furnished to him by Mrs. Gregory, on the hot-water faucet, and, at the request of plaintiff's wife, gave her the metal spud with the broken piece of porcelain attached that he took off the hot water faucet. (Appellant's App. 108, 112.)

Plaintiff's complaint was filed May 18, 1940; trial was had December 17-19, 1941, and on December 19, 1941, the jury returned a verdict for plaintiff in the sum of \$7,500. From the judgment entered on said verdict, this appeal is taken by the defendant.

STATEMENT OF POINTS.

I: The Court erred in refusing to direct a verdict for the defendant.

II: The Court erred in allowing the hypothetical question propounded to plaintiff's expert witness Colbert, and in admitting his answer thereto.

III: The Court erred in not declaring a mistrial after plaintiff's testimony concerning "the insurance company."

IV: The Court erred in refusing to set aside the verdict, and enter judgment for the defendant, or, in the alternative, to grant a new trial.

SUMMARY OF ARGUMENT.

I. There was no evidence of negligence on the part of defendant, and consequently the Court should have directed a verdict in his favor:

- (a) Plaintiff failed to prove negligence of defendant as alleged in the complaint;
- (b) Defendant's evidence established that there was no negligence.

II. The hypothetical question was improper, and the Court should not have permitted it to be asked or answered.

III. Plaintiff's reference to insurance was prejudicial, and the Court should have declared a mistrial.

IV. The verdict was unsupported by the proof; the jury was improperly influenced by erroneously admitted evidence, and the Court should have set aside the verdict and judgment and entered judgment for the defendant, or, in the alternative, should have granted a new trial.

ARGUMENT.**I. There Was No Evidence of Negligence on the Part of Defendant, and Consequently the Court Should Have Directed a Verdict in His Favor.****(a) Plaintiff failed to prove negligence of defendant as alleged in the complaint.**

The amendment to the plaintiff's complaint, filed by leave of Court on September 24, 1941, alleged that:

" * * * on, to-wit, October 21, 1939, the Defendant, through his agents, servants and employees, repaired and adjusted a water spigot in the bath room located in the apartment of the Plaintiff, same being apartment 4, 133 Webster Street, Northwest, Washington, D. C., and the said repairing, adjusting and work done upon the aforesaid spigot was done in a negligent, careless and improper manner. That the Plaintiff when he attempted to use the said spigot on, to wit, October 22, 1939, the handle of the same, by reason of the above, broke causing injuries to his hand as hereinafter set forth." (Appellant's App. 6.)

The case was tried and submitted to the jury upon the charge of negligence made by the amendment aforesaid. (Appellant's App. 131.)

There is nothing inherently dangerous in a bathroom faucet, and, as the Court said, this is not a case for the application of *res ipsa loquitur*. (Appellant's App. 75.) The burden of proof, therefore, was upon the plaintiff to prove the negligence as alleged by him in his complaint. *Brown v. Capital Transit Company*, ... App. D. C. ... (Decided April 13, 1942); *Bennett v. Washington Terminal Co.*, 55 App. D. C. 111, 2 F. (2d) 913; *Collins v. District of Columbia*, 60 App. D. C. 100, 102, 48 F. (2d) 1012.

The plaintiff did not allege the nature of the repair or the manner of its making, or specify which spigot was repaired. Nor did he introduce any testimony concerning the manner or method of making the repair, or indicating that there was

anything negligent, careless or improper about the making of it, or tending to show what would have been the proper manner of making it, or even identifying the spigot which was repaired, or establishing that any act whatever of the defendant caused the injury complained of.

Plaintiff's testimony tended to establish only the following: That the bathtub fixture, consisting of one outlet with two faucets, one hot and one cold, operated by porcelain handles which turned up and down, was dripping; that there had been, for some time, a crack in the porcelain handle of the hot water faucet of said fixture; that complaint was made by plaintiff to the manager of the apartment only of the dripping faucet, and not of the cracked handle (Appellant's App. 58); that the janitor, Branham, who usually made simple repairs, came to the apartment on Saturday evening, October 21, 1939, about 5 o'clock, and was "working on the tubs," "working on the spigots," or "the spigots on the tubs" (Appellant's App. 41); that on Sunday morning, October 22, 1939, plaintiff went into the bathroom to take a bath; that he sat on the commode, "kind of dozey from working all night," with his head down, "just thinking" (Appellant's App. 39); that he reached over with his right hand and turned on the cold water in the tub, let it run a short while, and then, while the cold water was running, turned on the hot water, and as he was turning it, the handle broke in his hand (Appellant's App. 39, 40, 54, 55); that he used the same pressure he always used, "just grabbed hold of the spigot and turned it on" (Appellant's App. 40); that he touched the handle with the back of his hand "positively", and does not know how he could have gotten hold of the handle with the palm of his hand, but when he got hold of the bottom and turned it over, the upper part of it was in his hand and cut it. (Appellant's App. 54-56.)

Although plaintiff once said that "the water did not come on" (Appellant's App. 39), and that "it did not turn on" (Appellant's App. 40), he said five times that he turned on the hot water (Appellant's App. 39, 40, 54, 55-56), and not once said the handle was hard to turn.

Plaintiff and his wife testified that the handles of the faucets stood straight up, perpendicular, when the water was turned off, and when turned on the handles turned downward about halfway (Appellant's App. 22, 38, 53-54). Plaintiff made no attempt at any time to show the type of fixture involved or how it worked; he did not produce any fixture for demonstration, and it was not until defendant's case that a fixture taken from the apartment of the manager, and identified as a Glauber fixture, the same as that in the plaintiff's apartment, was produced and used in demonstration (Appellant's App. 108-111).

Plaintiff introduced no testimony to identify the spigot on which Branham was working, or what Branham actually did, although he testified that he went into the bathroom while Branham was working (Appellant's App. 41). The remark of plaintiff's counsel in this regard during the Court's charge to the jury is significant. The Court stated in its charge that there was a conflict in the testimony as to whether it was the hot or the cold water faucet that was repaired. Defendant's counsel immediately objected to this statement, saying "I know of no conflict". To this, plaintiff's counsel replied that there was a conflict, for the reason that the plaintiff had testified that he knew "the hot water spigot was leaking" because he "put his hand under it" (Appellant's App. 134). No such statement, nor anything suggestive thereof, was made by the plaintiff, as an examination of the record will disclose, and the Court itself agreed with defendant's counsel that there was no evidence that anything was done to the hot-water spigot (Appellant's App. 134-135).

Nor did plaintiff adduce any evidence to prove that the "working on the spigots"—whatever it may have been—was done in a negligent, careless and improper manner, except by way of a hypothetical question propounded to plaintiff's expert witness, Colbert, hereinafter discussed, which failed to show any causal connection between the alleged negligent repair and the breaking of the handle. There is

no evidence that any work whatever performed by defendant's janitor was the proximate cause of the breaking of the handle.

Plaintiff utterly failed to prove the allegations that the "repairing, adjusting and work done" upon a water spigot "was done in a negligent, careless and improper manner", therefore, defendant's motion for a directed verdict, made at the end of plaintiff's evidence, should have been granted. *Weaver v. Baltimore & Ohio Railroad Co.*, 3 App. D. C. 436, 455; *McLachlan v. Perry*, 63 App. D. C. 24, 68 F. (2d) 769; *Collins v. District of Columbia*, *supra*; *Bennett v. Washington Terminal Co.*, *supra*; *Logsdon v. Central Development Association*, ... Mo., 123 S. W. (2d) 631.

(b) Defendant's evidence established that there was no negligence.

After the refusal of the Court to direct a verdict for the defendant at the close of plaintiff's evidence (Appellant's App. 77-78), defendant introduced evidence which conclusively negated all assumption, inference, and conjecture of plaintiff's case.

The testimony of the janitor, Branham, established that no work whatever was done on the handle of the hot water faucet, nor on the faucet of which it was a part. The janitor stated that when he went into the bathroom of plaintiff's apartment, he put his hand under the one outlet of the fixture and determined that it was the cold water that was dripping (Appellant's App. 82-83); that he cut off the cold water to the bathtub under the toilet seat and replaced the washer on the cold water spigot; that he did nothing to the hot water spigot or its handle (Appellant's App. 83); and that both the hot water faucet and cold water faucet worked easily, turned easily, and were all right when he left the apartment (Appellant's App. 83), and that the handles of the spigots were then in a position "below a horizontal" (Appellant's App. 85).

Further, the testimony of the defendant's witness Rhodes established that the fixture in question was a Glauber fixture (Appellant's App. 108-109), and that to shut off the hot water spigot one would turn the handle to the left, that is to say, downward, and one could never open it by turning it to the left (Appellant's App. 121); that on October 23, 1939, the day after the accident, the handles of the spigots were in the position as shown by the janitor, namely, in a below-horizontal position (Appellant's App. 110), that he operated the handles himself and that it was not hard to move them back and forth (Appellant's App. 116). This testimony indisputably refuted plaintiff's vague and speculative description of the manner in which the accident happened. The testimony of Rhodes that porcelain handles are standard equipment, a good type construction, and definitely strong, and that if one breaks, it has either been struck or dropped (Appellant's App. 111), was not controverted; and in the demonstration of the Glauber faucet, it was only after the juror folded his handkerchief several times, placed it around the handle, and pushed down on it with excessive force, that the cracked handle was broken. (Appellant's App. 117-120, 129-130).

The foregoing testimony of the janitor, uncontradicted by anyone, conclusively established the nature and manner of the repair that was made, and likewise established the utter lack of any negligence on the part of defendant. Negligence cannot be established by inferences drawn from other inferences in substitution for factual proof.

II. The Hypothetical Question Was Improper, and the Court Should Not Have Permitted it to Be Asked or Answered.

After the testimony of plaintiff and his wife, as hereinbefore set out, the plaintiff was allowed, over the objection of defendant, to ask plaintiff's expert witness, Colbert, a hypothetical question in an attempt, apparently, to prove negligent repair by defendant. The question, as first asked was as follows:

“I will show you a spigot, Mr. Colbert. Mr. Reporter, it is the same one that has been offered in evidence here. Assume, Mr. Colbert, these facts as correct and true; that this spigot, this handle which I hold in my hands in two pieces put together was on a hot water spigot, faucet, in a bath tub; and that the spigots were leaking, and that there was a drip in the tub; and a janitor of the apartment building in which this spigot was located came to the building to repair it or fix it, and that he did something with the spigot—what was done is not known at this moment—but he did something with the spigot, so that, when he finished with the spigot, the drip had disappeared.

“Assume further that the next day, when the spigot was attempted to be used, the following morning, that when it was turned or attempted be turned, the person using ordinary pressure of their hands, as they would to turn a spigot, that the porcelain broke, and the spigot or the handle of the spigot did not move, remained stationary.

“I will ask you whether or not under those circumstances you would say that the spigot had been repaired in a proper and careful manner or whether it had been repaired in a negligent manner.” (Appellant’s App. 65)

After an objection the following was added:

“Assume, as a correction, that the handle was not repaired, but that the leak was repaired, something was done with the spigot itself or the mechanism of the spigot, so that the leak itself was stopped.” (Appellant’s App. 66)

After further objection, the following was added:

“Assume further that a washer was put in there.” (Appellant’s App. 66)

After still further objection, there was added:

“that through the word ‘hot’, which appears on that porcelain part of the handle, there was apparent—there was a crack which was visible.” (Appellant’s App. 67)

Defendant's counsel objected to the entire question, after which the Court interrogated the witness as follows:

"Q. Have you an opinion on that state of facts that they asked you to assume?

A. Yes, your Honor.

Q. You really have an opinion?

A. Yes.

Q. All right, what is it?

A. I would say that the spigot was repaired in a defective manner, because the spigot should have opened, even though the handle did break; otherwise it should open easily at the time." (Appellant's App. 67)

The question was never put into coherent form, and it was impossible for the witness or the jury to determine just what the question was. No "spigot" was shown to the witness, for no spigot was in evidence in the case at that time; he was shown only two broken pieces of a porcelain handle. He had no personal knowledge of the fixture in question, for example, that it was a Glauber combination type of fixture in which a drip in the single outlet could be caused by the leak of either the hot or cold water, nor did he know what kind of a washer was used on the spigot. (Appellant's App. 69)

It is well settled that the opinions of experts, if they are admissible, must be based upon facts which have been proved at the trial, and not upon hypotheses unsupported by testimony. *Scheller v. Schindel*, 153 Md. 547, 138 A. 415; *Harten v. Loffler*, 212 U. S. 397, 53 L. Ed. 568.

As the witness had no personal knowledge of the facts, and the question did not disclose them, it is clear he could have had no safe opinion on the subject.

Shapiro v. Pennsylvania R. Co., 65 App. D. C. 324, 326, 83 F. (2d) 581.

A hypothetical question, designed to elicit the opinion of an expert witness on a given condition or state of facts of which he has no personal knowledge, must, of course, be based upon a hypothetical statement of that condition or state of facts, which must correspond with the facts in evi-

dence, and must not import into the question any element not founded upon the evidence in the case. If it offends in either respect it is defective and it is error to permit such a question to be given.

The question propounded to the witness required the assumption that the janitor had worked upon the portion of the fixture upon which plaintiff was injured; that the spigot to which the handle in question was attached, that is, the hot water spigot, was causing the drip, and because of the janitor's work on that spigot the spigot did not move when the handle broke under ordinary pressure. There was no foundation in the testimony for the facts assumed. All of those assumptions were unwarranted, and the subsequent testimony of the defendant conclusively showed that none of them could be established.

See: *Labofish v. Berman*, 60 App. D. C. 397, 55 F. (2d) 1022.

The question was bad, also, because it asked the witness whether "that spigot had been repaired in a proper and careful manner or whether it had been repaired in a negligent manner". This was nothing but an attempt to invade the province of the jury as to the ultimate issue to be decided; and as the Court said, "That is the vice of the question. * * * I think he should have told you the proper manner" of repair (Appellant's App. 74).

The question of negligence is not to be resolved by opinion evidence, and the expert ought not to have been asked or allowed to state his conclusions on the whole case. *United States v. Spaulding*, 293 U. S. 498, 506, 79 L. ed. 617, 623.

Despite the doubt which existed in the Court's mind on the propriety of the hypothetical question and its answer, the Court overruled defendant's objection thereto and instructed the jury that the value and weight of the expert testimony

"depend upon whether the evidence shows that the assumed or supposed facts have been established. Obviously, if such facts have not been established by the evidence, then the opinion is weakened to the extent

at least that it is based on facts which the evidence does not establish.” (Appellant’s App. 137)

Such instruction, on the improperly framed question, was error in that it was primarily the duty of the Court to determine whether there was any testimony to support the hypotheses, and, if not, then the question should not have been permitted. There was no such evidence and the submission of the question and answer to the jury afforded an erroneous basis for speculation on the question of negligence.

Subsequent to answering the hypothetical question, the witness Colbert testified that the way to repair a leaking spigot is to put in a new washer, or else, if the seat is worn, to reseal it; that a leak can be temporarily stopped by using a very hard washer and screwing it down very tightly, which would make the handle hard to turn (Appellant’s App. 68). There was then no testimony as to the character of the washer, how it was screwed down, or which faucet it was on, or whether the handle was hard to turn.

The plaintiff was allegedly injured by the breaking of the handle. There was, admittedly, no repair made to the handle. (Appellant’s App. 52.) Even assuming a “defective repair” to the spigot, the testimony of the witness Colbert in no wise established that such repair proximately caused the handle to break.

The admission of the question and answer and the further testimony of the witness Colbert, over the objection of defendant, was error.

III. Plaintiff’s Reference to Insurance Was Prejudicial, and the Court Should Have Declared a Mistrial.

In the course of plaintiff’s testimony concerning his hospital bills, the following occurred in the presence of the jury:

“By Mr. Lynch:

Q. Do you remember how much they were?

A. They never sent me the bill. I thought the insurance company would take care of it, I guess.

Mr. Lynch: That is all right. Don't let us get that. Now, if your Honor please, I have here the amounts—

Mr. Arth: What was his statement? I didn't hear it.

The Court: It doesn't mean anything. He doesn't know what he is talking about.

The Witness: I have accident insurance.

The Court: He says he has accident insurance.

Mr. Arth: Oh, I was wondering what he was talking about.

The Court: He didn't say it in that way.” (Appellant's App. 44.)

Then at the bench, out of the hearing of the jury, plaintiff said he was carrying Masonic insurance, and \$500 accident insurance; that he did not know whether they had taken care of the bills. Later, another colloquy was held at the bench, regarding the necessity of proving the bills sent to the insurance company, at which time the Court said, “He let out something about insurance.” (Appellant's App. 45-46.)

The above portion of the record speaks for itself. Plaintiff's original statement did not indicate that the insurance company to which he referred was his own accident insurance company, and his remark suggested that the defendant was insured. Especially was this true in view of what immediately transpired. There was not only the harm from what the witness initially said, but also from the inevitable speculation by the jury as to what he apparently had not been permitted to say when his counsel said, “Don't let us get that.”

Further, and most important, the remarks by the Court in reply to defendant's counsel, that “It doesn't mean anything. He doesn't know what he is talking about,” and that “He didn't say it in that way,” tended, unquestionably, to instill in the minds of the jurors the suggestion that defen-

dant was insured, and that the Court was endeavoring to ignore the reference to insurance. But the endeavor only emphasized the reference.

The law in this jurisdiction is well settled on the question of the harm in the introduction of immaterial evidence showing that the defendant is insured. As stated in *Brooke v. Croson*, 61 App. D. C. 159, 58 F. (2d) 885, (1932) such evidence "conveys the insidious suggestion to the jurors that the amount of their verdict for the plaintiff is immaterial to the defendant," and that "testimony of this character is an invitation to find a verdict on false grounds." See also *Culp v. Repper*, 64 App. D. C. 337, 78 F. (2d) 221 (1935), wherein it is said: "The courts are very cautious in admitting testimony of this sort, and it is only in an extreme case where it becomes essential in meeting a decisive issue that such testimony will be admitted."

See also: *Capital Construction Co. v. Holtzman*, 27 App. D. C. 125; and *James Stewart & Co. v. Newby*, 266 F. 287 (C. C. A. 4th) cited in *Brooke v. Croson*, *supra*, wherein it was stated that the error would not even have been cured by a later instruction to the jury to disregard it.

It is regrettable that counsel for defendant did not hear the plaintiff's remarks about insurance and relied upon the Court's reply to counsel's inquiry as to what plaintiff had said. In this situation, defendant's counsel did not request a mistrial, which he promptly would have done had he then known what plaintiff actually did say.

It is respectfully submitted, nevertheless, that the Court should have declared a mistrial of its own initiative. It was the Court's duty to give the case such direction as would prevent a result inconsistent with the law. The trial judge is primarily responsible for the just outcome of a trial. He is not "a mere moderator of a town meeting," submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who stands charged with full responsibility. *Patton v. Texas & Pacific Railway Company*, 179 U. S. 658, 660, 45 L. ed. 361, 363.

He should make no remark or comment which would tend to emphasize or minimize the value, weight or effect of evidence.

It seems clear from an examination of the record of the proceedings pertaining to this question, that the Court endeavored to minimize the effect of plaintiff's evidence relating to insurance. This endeavor served only to increase the "insidious suggestion," and a new trial was the only solution to bring about a "just outcome" of the case.

IV. The Verdict Was Unsupported by the Proof: The Jury Was Improperly Influenced by Erroneously Admitted Evidence, and the Court Should Have Set Aside the Verdict and Judgment and Entered Judgment for the Defendant, or, in the Alternative, Should Have Granted a New Trial.

Notwithstanding the total absence of proof of negligence in the case, the jury returned a verdict for the plaintiff in the sum of \$7,500. Defendant duly filed a motion to set aside the verdict and enter judgment for the defendant, or, in the alternative, to grant a new trial (Appellant's App. 9-12).

From the review of the facts presented herein, it is earnestly submitted that the Court should have set the verdict aside and entered judgment for defendant, thereby correcting its error in allowing the case to go to the jury.

During the testimony of defendant's witness, Branham, the Court produced an old spigot from his tool-box in his chambers (Appellant's App. 88). Defendant's counsel objected to the use of it (Appellant's App. 89). During cross-examination plaintiff's counsel first questioned the witness as to the location of the washer and the manner of replacing the washer on that spigot, in spite of the witness's immediate and repeated protest that it was a different spigot altogether, and that he had never worked on such a spigot (Appellant's App. 88, 94-97). Then that spigot was taken

apart and plaintiff's counsel endeavored to show that the witness had incorrectly indicated the position of the washer. (Appellant's App. 88-90, 94-95, 97.) This spigot, totally unconnected with the case, was later identified as a Fuller fixture, of an old and discontinued type, which has a ball in place of the washer (Appellant's App. 114-115). The proceedings clearly show the harm and confusion resulting from the demonstration with such a spigot, gratuitously produced by the Court itself, and the unfairness of the attempt to contradict the witness and create a doubt as to his truthfulness and competency, as to which there was no question; and the Court in passing upon the motion to set aside the verdict should have considered the prejudicial effect of his introduction of that spigot.

The size of the verdict alone raises a fair presumption that the jury was receptive to the "insidious suggestion" of the defendant's insurance, and to the "invitation to find a verdict on false grounds." *Brooke v. Croson, supra*. Plaintiff's hospital and doctors' bills amounted to only \$289.00. He had three operations on his injured hand, and, concededly, suffered pain. At the time of the accident, he was earning approximately \$65.00 a week, plus overtime (Appellant's App. 47); he was out of work until around the middle of May, 1940 (Appellant's App. 48); at that rate his loss of earnings as a result of his injury would have been approximately \$1,800.00. Upon resuming employment in May, 1940, he received \$70. per week (Appellant's App. 49), and at the time of trial, in December, 1941, more than two years after his injury, he was earning from \$85. to \$147. per week. The "further operation", which the amendment to the complaint alleged would be necessary (Appellant's App. 6-7), was not shown to have been advised or required (Appellant's App. 72-73).

Colbert's answer to the hypothetical question, that "the spigot was repaired in a defective manner", was grossly prejudicial, and fixed in the minds of the jurors the predominating notion that a defective repair caused plaintiff's in-

jury, and they did not fairly determine for themselves the issue of the defendant's negligence. A review of the testimony impels this conclusion.

In any event, the verdict should have been set aside and a new trial granted, for the reason that the verdict clearly indicated that the jury was improperly influenced and misled by the various errors and extrinsic factors which occurred during the trial to the prejudice of the defendant.

CONCLUSION.

In conclusion, it is respectfully submitted that on the points herein presented it was the duty of the Court below to direct a verdict for the defendant, or to enter judgment in his favor notwithstanding the verdict, or to grant a new trial, and the judgment of the Court entered upon the verdict of the jury should therefore be reversed.

CHARLES W. ARTH,
509 Albee Building,
Washington, D. C.

AUGUSTUS P. CRENSHAW, III,
Woodward Building,
Washington, D. C.
Attorneys for Appellant.

APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8357

JOHN T. HENKEL, *Appellant*,

v.

JOHN E. VARNER, *Appellee*.

Appeal from the District Court of the United States
for the District of Columbia.

APPENDIX TO BRIEF FOR APPELLANT.

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS
DESIGNATED BY APPELLANT.**

1 In the District Court of the United States
for the District of Columbia

Civil Action No. 7031

JOHN E. VARNER, 133 Webster St., N. W., Washington, D. C.,
Plaintiff,

v.

JOHN T. HENKEL, 1756 Church St., N. W., Washington, D. C.,
Defendant.

Complaint for Damages Caused by Defective Equipment

1. The jurisdiction of the Court is derived from Title 18,
Chapter 3, Section 44, of the Code of Laws (1929) for the
District of Columbia.

2. This Complaint is for damages, brought by the plaintiff, John E. Varner, against the defendant, John T. Henkel, on the following grounds.

3. The plaintiff had prior to October 22, 1939, rented premises known as Apartment 4, 133 Webster Street, N. W., Washington, D. C., from the defendant or his agent, and, on, to wit, October 22, 1939, was occupying the said premises with his family as a residence. Plaintiff states that the defendant, through his agents, servants and employees, caused and permitted a certain water spigot to become and remain in a defective condition, of which defective condition the defendant directly, or through his agents, servants or employees, was notified, and failed to repair or replace the same.

4. Plaintiff states that on, to wit, October 22, 1939, while in the act of using the said water spigot in his apartment as aforesaid, the said spigot broke, due to its defective condition, which defective condition the defendant was advised of directly, or through his agents, servants or employees, and had negligently failed to repair or replace the same.

5. Plaintiff further states that when the said spigot broke, as aforesaid, it caused a deep wound in his right hand and he was taken to the hospital for treatment. Thereafter he received treatment from various physicians in the District of Columbia and on, to wit, November 3, 1939, was again required to return to the hospital for an operation on his said hand, both of the tendons of the right ring finger of the right hand were sewed together. Thereafter he received medical

2 treatment for the injuries so sustained by him and, to wit, February 13, 1940, plaintiff was again required to submit to hospitalization and to have amputated the right ring finger of his right hand just proximal to the second joint. That thereafter he was required to receive medical care and attention until the said finger had healed. All of the said injuries were severe and painful and of a permanent nature. That as a result of the said injuries, caused by the negligence of the defendant as aforesaid, and the pain incident thereto, the operations upon the plaintiff's

hand, he suffered and will continue to suffer a severe and permanent physical, nervous and mental shock. The said injuries have caused the plaintiff to be permanently crippled and deformed, which causes the plaintiff embarrassment and humiliation.

6. Plaintiff further states that by reason of the aforesaid injuries so suffered by him, he has been required to expend large sums of money for doctors, medicines, and hospitalization, in the sum of, to wit, One Thousand (\$1,000.00) Dollars, and has been unable, by reason of the said injuries, to perform his usual and ordinary trade of a carpenter and pattern maker and has since, to wit, the 22nd day of October, 1939, suffered a loss of earning power of, to wit, One Hundred Ten (\$110.00) Dollars per week, and will in the future suffer and sustain great loss of earning power, the exact amount of which cannot be estimated at this time. That all of the said damages and injuries aforesaid were and are painful and of a permanent nature.

Wherefore, the plaintiff demands judgment against the defendant in the sum of Fifty Thousand (\$50,000.00) Dollars.

ROBERT E. LYNCH,
821 15th Street, N. W.,
Washington, D. C.,
Attorney for Plaintiff.

The plaintiff, by counsel, hereby demands a trial by jury in the above entitled cause.

ROBERT E. LYNCH,
Attorney for Plaintiff.

* * * * *

3

Answer.

Comes now the defendant by his attorneys Charles W. Arth and Charles Arth LaFarge, and for answer to the complaint herein, says:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

3. Defendant admits that, prior to October 22, 1939, plaintiff rented from the defendant or his agent, premises known as Apartment 4, 133 Webster Street, N. W.; defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation that on, to wit, October 22, 1939, plaintiff was occupying the said premises with his family as a residence; denies each and every the remaining allegations contained in paragraph 3.

4. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation that on, to wit, October 22, 1939, while plaintiff was using a water spigot in the apartment aforesaid, the said spigot broke; denies each and every the remaining allegations contained in paragraph 4.

5. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation that said spigot broke and injured plaintiff, nor that plaintiff suffered pain and required hospitalization and medical care and attention; defendant denies that said alleged break and injuries, if any, were caused by, or the result of any negligent or other act or omission whatsoever of defendant, his agents, servants or employees; denies each and every the remaining allegations contained in paragraph 5.

6. Defendant denies each and every the allegations contained in paragraph 6.

Defendant denies that plaintiff was damaged in the sum of Fifty Thousand (\$50,000.00) Dollars, or in any other sum, as a result of any negligent act or omission whatsoever, of defendant, his agents, servants and employees; denies that he, his agents, servants or employees, were negligent in any of the respects alleged in the complaint.

Third Defense

Defendant says that at the time and place mentioned in the complaint the spigot in question was in a reasonably safe condition and that reasonable care was exercised by the defendant in the maintenance thereof in a safe condition; that if the plaintiff sustained injuries at the time and place in the complaint alleged and suffered losses and damages as a result thereof, such injuries, losses and damages were not caused by, contributed to, or the result of, any defective condition of said spigot, or of any negligent or other act or omission whatsoever of defendant; but such injuries, losses and damages, if any, were caused solely by the negligence and carelessness of the plaintiff in wilfully applying grossly excessive and unnecessary pressure to the valve handle of the said spigot, thereby causing said handle to break.

Fourth Defense

Defendant says that the spigot in question was in a reasonably safe condition when said apartment was originally rented to plaintiff; that said spigot was not thereafter changed or altered by defendant, except for the occasional renewal of washers therein; that defendant had no
6 knowledge, actual or constructive, of any defect in the said spigot; that the plaintiff had been an occupant of said apartment and had used said spigot for a period of more than two years prior to said October 22, 1939; that the condition of the said spigot was open and obvious to the plaintiff, and his failure to observe the condition thereof, and if defective, to notify the defendants of any defects therein, caused or contributed to cause such injuries and damages, if any, as the plaintiff sustained by reason of the occurrence mentioned in the complaint.

Fifth Defense

Defendant says that the plaintiff neglected and failed to use due care for his own safety under the conditions and circumstances existing at the time and place referred to in

the complaint, and that the alleged injuries, losses and damages, if any, were not caused by, contributed to, or in any wise the result of any negligent or other act or omission whatsoever, of defendant, his agents, servants or employees.

CHARLES W. ARTH
 CHARLES A. LA FARGE
 509 Albee Building
 Washington, D. C.
Attorneys for Defendant
John T. Henkel

Copy of the above answer mailed to Robert E. Lynch, attorney for plaintiff, 821 Fifteenth St., N. W., Washington, D. C. June 10, 1940.

CHARLES A. LA FARGE

* * * * *

7 *Amendment to Complaint for Damages Caused by Defective Equipment*

The Plaintiff, by leave of Court, amends his Complaint by adding thereto the following:

4a. The Plaintiff states that on, to wit, October 21, 1939, the Defendant, through his agents, servants and employees, repaired and adjusted a water spigot in the bath room located in the apartment of the Plaintiff, same being apartment 4, 133 Webster Street, Northwest, Washington, D. C., and the said repairing, adjusting and work done upon the aforesaid spigot was done in a negligent, careless and improper manner. That the Plaintiff when he attempted to use the said spigot on, to wit, October 22, 1939, the handle of the same, by reason of the above, broke causing injuries to his hand as hereinafter set forth.

6a. Plaintiff is advised that he will have to undergo a further operation upon his hand and he will be required to spend a sum of money for doctors and hospital, the exact

amount at this time cannot be determined and will be required to remain away from his usual and ordinary occupation with consequent loss of earning power.

ROBERT E. LYNCH,
821 Fifteenth St., N. W.,
Washington, D. C.,
Attorney for Plaintiff.

Sept. 24/'41 No objection to filing.

CHAS. W. ARTH
Atty. for Defendant

* * * * *

8 *Answer to Amendment to Complaint*

4a. The Defendant admits that on to wit, October 19, 1939, he through his agent, servant and employee replaced a washer on one of the spigots in the bath room of apartment number 4, 133 Webster Street, Northwest, Washington, D. C.; Defendant denies each and every the remaining allegations of said Paragraph 4a.

6a. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6a.

CHAS. W. ARTH,
509 Albee Building,
Washington, D. C.,
Attorney for Defendant.

Copy of the above answer to amendment to complaint mailed to Robert E. Lynch, attorney for plaintiff, 821 Fifteenth St., N. W., Washington, D. C., October 3, 1941.

CHAS. W. ARTH

9 Endorsed: Filed Dec 19 1941 Charles E. Stewart,
 Clerk

Verdict and Judgment for Plaintiff

In the District Court of the United States for the
District of Columbia

Civil No. 7031

JOHN E. VARNER, *Plaintiff*,

v.

JOHN T. HENKEL, *Defendant*.

Verdict and Judgment

This cause having come on for hearing on the 17th day of December, 1941, before the Court and a jury of good and lawful persons of this district, to wit:

Allen W. Mertz	George C. McCabe
Charles T. Foltz	Nora D. Cahill
Milton Davis	Venita W. Keil
Evelyn B. Mason	Leslie A. Lyles
Helen R. Whitbeck	Luther S. Rood
Armand J. Gumprecht, Jr.	Marion C. Fox

who, after having been duly sworn to well and truly try the issues between John E. Varner, plaintiff, and John T. Henkel, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 19th day of December, 1941, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of Seven Thousand Five Hundred Dollars (\$7,500.00).

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), together with costs.

CHARLES E. STEWART,
Clerk,

By KENNETH D. WOOD,
Assistant Clerk.

By direction of

JUSTICE O. R. LUHRING

* * * * *

10 *Motion of Defendant to Set Aside Verdict Entered Herein on December 19, 1941, and Have Judgment Entered for Defendant in Accordance With Defendant's Motion for a Directed Verdict; or, in the Alternative for a New Trial.*

Comes now the defendant, by his attorney, Charles W. Arth, and moves the Court to set aside the verdict herein and the judgment entered thereon December 19, 1941, and to have judgment entered in favor of the defendant, in accordance with his motion for a directed verdict made at the close of plaintiff's case, and renewed at the close of all the evidence; or, in the alternative, that a new trial be granted.

As grounds for this motion, defendant says:

1. The Court erred in refusing to direct a verdict in favor of the defendant, as requested.

2. There was a fatal variance between the allegations of the complaint filed herein and the proof offered by the plaintiff in support thereof.

3. The verdict is contrary to the evidence.

4. The verdict is contrary to the weight of the evidence.

5. The verdict is contrary to the law as given to the jury by the Court.

6. The Court erred in refusing to grant the instructions to the jury as requested on behalf of the defendant.

7. The Court erred in granting the instructions to the jury requested on behalf of the plaintiff.

8. The Court erred in refusing to admit certain testimony offered in behalf of the defendant.

11 9. The Court erred in admitting certain testimony offered in behalf of the plaintiff over the objection of the defendant.

10. The damages awarded by the jury are grossly excessive.

11. The Court erred in not declaring a mistrial after plaintiff testified that the medical bills had been sent to "the insurance company."

12. The jury misconducted themselves, among other respects, in that the said jury, after the case had been given to them by the Court, and after they had retired to their jury room to consider their verdict, in considering the case, were guided and influenced by matters not offered in evidence during the trial of the case, and by matters which, as a matter of law, they had no right to know or consider, thereby materially prejudicing defendant's right, as shown by the affidavit of Linwood E. Lagerson attached hereto and made a part hereof.

13. And for such other errors apparent upon the face of the record.

Oral Hearing is requested.

CHARLES W. ARTH,
509 Albee Building,
Washington, D. C.,
Attorney for Defendant.

Notice

To: Robert E. Lynch, Esquire,
Bowen Building,
Washington, D. C.

Please take notice that the foregoing motion to set aside verdict entered herein on December 19, 1941, and have judgment entered for defendant in accordance with defendant's

motion for a directed verdict or, in the alternative for a new trial, together with the attached affidavit and memorandum of points and authorities will be filed on December 29, 1941.

CHARLES W. ARTH,
509 Albee Building,
Washington, D. C.,
Attorney for Defendant.

Service of copy of the foregoing motion and notice, with the annexed affidavit and memorandum of points and authorities, is hereby acknowledged this 29th day of December, 1941.

ROBERT E. LYNCH,
Attorney for Plaintiff.

12 *Affidavit of Linwood E. Lagerson*

District of Columbia, ss:

Linwood E. Lagerson, being first duly sworn, deposes and says:

I am a member of the Bar of the District Court of the United States for the District of Columbia and at the request of Mr. Charles W. Arth, attorney for the defendant in the above-entitled cause, I interviewed several of the jurors who tried said cause. On December 26, 1941, I interviewed Milton Davis, of 5313 4th Street, Northwest, a juror on said panel, who stated to me that in his opinion the verdict rendered by the jurors in the Varner case was wholly unjustified; that he believed then, as he did at the time of the trial, that Mr. Varner was not justified in any recovery; that he was persuaded to change his mind because other members of the jury kept telling him they wanted to get away, that it was time to eat and that it was no use in his holding out against eleven others; that during the discussion of the case in the jury room the question of insurance was discussed; that he believed he was the one who stated that Mr. Varner said on the witness stand that the insurance company had received the doctor bills, at

which point his lawyer stopped him; that to prove his contention that the cutting of Mr. Varner's hand was an accident he was the one who asked that the fixture displayed in the court be brought to the jury room; that he tried to show the other members that it would be impossible, or at least highly improbable, that a person could cut his hand on the handle unless he first released his grasp on the handle; that he examined the fixture to see its construction; that he took off the handles, took off the porcelain cover, unscrewed the valve and the washer; that he attempted to take the valve apart but it was fastened so tightly that he could not; that if he were to sit on the jury in the same case again he would still hold that there should be no recovery, but he would not hold out against eleven others.

At the conclusion of said interview I asked Mr. Davis to sign a statement setting forth these facts. He then stated that while the facts were true, he did not care to give me a written statement to the effect.

On December 29, 1941, I interviewed Mrs. Nora Cahill, of 3413 Oakwood Terrace, Northwest, who gave me the following statement, in writing, signed by her, namely:

"In the Varner case I was a juror. I examined the fixture which was displayed in the Court Room, but I did not take it apart. The men in the jury room took it apart. There was some mention made of insurance in the jury room. The \$7500 figure was arrived at by adding together the amounts each juror thought was justified and then dividing by twelve. I was in favor of awarding Mr. Varner \$10,000."

LINWOOD E. LAGERSON

Subscribed and sworn to before me this 29th day of December, 1941.

MABEL E. ASHLEY,

(Seal)

Notary Public, D. C.

* * * * *

In Re Motion to Set Aside Verdict And/Or For New Trial.

This is an action for damages on account of injuries sustained in the use of a bathtub fixture, which, it is claimed, had been negligently repaired by the landlord's agent and servant. There was a verdict in favor of the plaintiff for \$7,500. Within ten days after the reception of the verdict, the defendant, having theretofore moved for a directed verdict, files his motion to have the verdict set aside and judgment entered in accordance with his motion for directed verdict or, in the alternative, that a new trial be granted.

It is conceded that the plaintiff for some time prior to the accident was the tenant of the defendant and occupied apartment No. 4 in the premises located at and known as 133 Webster Street, N. W. in the city of Washington. The spigot in the bathtub leaked and the plaintiff requested that it be repaired. The janitor of the apartment undertook to stop the leak by replacing the old washer with a new one. The claim is that the repair was negligently and improperly made and that, because of this negligence, when the plaintiff undertook to turn on the hot water for his bath the handle broke and caused such injuries to the ring finger of his right hand as required the amputation of the finger.

It will serve no useful purpose to review the evidence. There is conflict as to whether the hot water handle, the one that broke and caused the injury, was defective and cracked at the time of the accident. The plaintiff
369 and his wife testify that it was and that it had been cracked for some time. This the janitor denies (R. 194). There is also conflict in the evidence as to the time the repair was made.

It is significant that the plumber who repaired the spigot the next day after the accident testifies that he found it necessary to regrind both the hot water and cold water spigots and insert a new washer in each. He also replaced the broken hot water handle with a new one. (R. 226).

The question of the plaintiff's contributory negligence was also involved. This was based on the claim that the plaintiff, knowing that the hot water handle was cracked, was careless in the manner in which he sought to operate it and thus caused it to break and injure his hand.

The case was one for the jury to consider. In addition to the testimony of the witnesses, it had before it the broken handle and, also, a complete fixture which, it was agreed, was the same as that on the bathtub in the plaintiff's apartment. By consent of counsel, the jury was permitted to take this fixture to the jury room and examine it during their deliberations. There is substantial evidence to support the verdict.

The verdict is not excessive. The plaintiff was permanently disfigured by the loss of the finger. He suffered great pain, and faces the prospect of another operation.

The motion to set aside the verdict and to render judgment in accordance with the motion for directed verdict is denied, as is also the alternative motion for a new trial.

O. R. LUHRING

Justice.

May 27, 1942.

370 Endorsed: Filed, Jun 17 1942 Charles E. Stewart,
Clerk

Notice of Appeal. 73 (B)

In the District Court of the United States for the
District of Columbia

Civil No. 7031

JOHN E. VARNER, *Plaintiff,*

v.

JOHN T. HENKEL, *Defendant.*

Notice of Appeal

Notice is hereby given this 17th day of June, 1942, that John T. Henkel, Defendant, hereby appeals to the United

States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of December, 1941, in favor of John E. Varner, Plaintiff, against said John T. Henkel, Defendant, the motion of said defendant to set aside the verdict and vacate said judgment and enter judgment for said Defendant, or, in the alternative, grant a new trial, having been denied May 27, 1942.

CHARLES W. ARTH
A. P. CRENSHAW, III
Attorneys for Defendant,
509 Albee Building,
Washington, D. C.

Attorney for plaintiff:

ROBERT E. LYNCH, Esq.,
Bowen Building,
Washington, D. C.

* * * * *

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Order

Upon consent of counsel representing the respective parties hereto, it is by the Court this 28th day of July, 1942,

ORDERED That the original exhibits of plaintiff and defendant offered in evidence at the trial of the above-entitled cause be forwarded by the Clerk of this Court to the United States Court of Appeals for the District of Columbia with the record on appeal in lieu of copies thereof.

BOLITHA J. LAWS,
Justice.

We Consent:

ROBERT E. LYNCH
Attorney for plaintiff

CHARLES W. ARTH
AUGUSTUS P. CRENSHAW, III
Attorneys for defendant.

July 29 1942

Memorandum

Supersedeas bond on appeal (\$8,000.00) approved July 28, 1942, filed.

* * * * *

373 *Order Extending Time for Filing Record on Appeal.*

Upon motion of the defendant in the above-entitled cause, it is by the Court this 21st day of August, 1942,

ORDERED, That the time for filing the record on appeal and docketing the action in the appellate court be and the same is hereby extended to and including the nintieth (90th) day from the date of the notice of appeal.

MARTIN F. McGUIRE
Justice.

No objection:

ROBERT E. LYNCH,
Attorney for plaintiff.

* * * * *

374 *Designation of Record of John E. Henkel, Appellant*

The Clerk will please prepare the Record for Appeal and include therein the following:

1. Complaint.
2. Answer to Complaint.
3. Amended Complaint.
4. Answer to Amended Complaint.
5. Verdict and Judgment.
6. Motion of Defendant to Set Aside Verdict, and Have Judgment Entered for Defendant in Accordance with Defendant's Motion for a Directed Verdict; or in the Alternative for a New Trial.
7. Affidavit of Linwood E. Lagerson attached to said motion.
8. Motion of Plaintiff to Strike Affidavit of Lagerson.
9. Two (2) Affidavits of Robert E. Lynch filed January 7, 1942.

10. Plaintiff's Instructions Nos. 1, 2, 3, 4, 5, and 6.
11. Defendant's Instructions Nos. 1, 2, 3, 4, 5, 6, 7, and 8.
12. Stenographic transcript of proceedings at trial, together with exhibits attached thereto and deposition of Dr. Borden.
13. Memorandum of Court in re Motion to Set Aside Verdict and/or for New Trial, filed May 27, 1942.
- 13a. Memorandum of Bond filed.
14. Notice of Appeal.
- 14a. Order in re Exhibits.
15. This Designation.

CHARLES W. ARTH
 AUGUSTUS P. CRENSHAW, III
 Albee Building,
 Washington, D. C.,
Attorneys for appellant.

ROBERT E. LYNCH
Attorney for plaintiff.

* * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS DESIGNATED BY APPELLANT.

42 **Mrs. Pearl Eunice Varner** was produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

43 Direct Examination

By Mr. Lynch:

Q. Mrs. Varner, your full name is what? A. Pearl Eunice Varner.

Q. You are the wife of Mr. Varner, the plaintiff here in this case? A. I am.

* * * * *

Q. Did you live at 133 Webster Street, Northwest, in 1939? A. I did.

Q. How long had you lived there, say, at the time this accident happened in October, 1939? How long did you live there? A. We were there, I guess it was, a little over two years or apparently two years.

* * * * *

44 Q. I will ask you, Mrs. Varner, directing your attention to the spigot in the bathroom of the premises 133 Webster Street, Northwest, did you have occasion to know whether the spigot was leaking or dripping before this accident to Mr. Varner on the 22nd day of October, 1939? A. Yes. It was bothering me quite a few times.

Q. Do you know whether or not a request was made by Mr. Varner or was one made by you to Mrs. Gregory or the janitor to have it repaired? A. Well, he had and I
45 that it was leaking several times. Both of us had complained about it.

Q. Approximately how many times would you say you had complained about it during the period of your tenancy before the accident? A. You mean the whole time that we were there?

Q. Yes. A. Oh, I imagine about three or four times.

By the Court:

Q. Whom did you complain to? A. The resident manager, Mrs. Gregory.

By Mr. Lynch:

Q. After you would complain, would they come up there and adjust it? A. Yes; as a rule Branham, the janitor, came up and fixed it for us.

Q. Do you know whether they ever had a registered plumber come up and fix it? A. No, sir.

Q. When you say "No, sir," what do you mean? That no registered plumber came up? A. No registered plumber came up.

Q. Who did the other repairs in the apartment, such as the painting or papering? Was that taken care of by the landlord also? A. I think H. L. Rust had that done.

* * * * *

46 Q. On this time shortly before the accident can you tell whether or not anyone, in response to a complaint made, came up and fixed the spigot or attempted to fix it? A. Well, Branham always came up and fixed it.

The Court: No. He is talking about before.

By Mr. Lynch:

Q. Shortly before the accident did anyone come up? A. Yes. Branham came.

Q. When did he come up? A. Well, he came up twice. He came up about two weeks before the accident. Then he came up on the Saturday night just before the accident.

Q. When did the accident happen? What day of the week? A. That was on a Sunday morning.

Q. On this Saturday evening how long was he in the bathroom during the time he was adjusting the spigot? A. How long was he?

Q. Just approximately. A. I don't know. He was in there for a while, I think. I imagine, a half an hour at least.

Q. And then after Branham left did you use those
47 tub spigots that Saturday evening or early on Sunday morning? A. I did not use them that evening.

Q. Did anyone else? Did Mr. Varner use the spigots in the bath tub that Saturday night? A. Not that I recall.

The Court: This was Saturday night.

The Witness (laughing): We take them on Friday nights.

* * * * *

By Mr. Lynch:

Q. On Sunday morning, Mrs. Varner, I will ask you whether you were in the bathroom at the time that Mr.

Varner was in the room, or were you in another part of the apartment? A. I was in the kitchen.

Q. Tell us what happened unusual. A. Well, I was cooking breakfast. Mr. Varner was getting ready to take a bath. He was going out to see about a little business on Sunday morning. And all of a sudden he yelled for me.

The Lord knows I didn't know what had happened; so I flew in, and blood was spurting everywhere. He had cut his hand.

* * * * *

48 Q. What did you find, Mrs. Varner? A. Well, his hand—he was holding his hand here (indicating), and blood was just flying all over everything.

So I ran and grabbed the best tourniquet that I had, and tied it around his arm and asked him to hold it.

* * * * *

Q. Where was the cut in his hand? Show the jury, Mrs. Varner, with your own hand what part of his hand was cut. A. Here (indicating).

Mr. Lynch: Indicating, Mr. Reporter, the palm of the hand.

Q. And after he was taken to the hospital, he later
49 returned home, did he? A. Yes.

Q. Then did there come an occasion when he went back to the hospital? A. Well, he just went to Garfield emergency room and had the bleeding taken care of; and apparently the doctor there did not catch the tendon that was cut; and we consulted Dr. Castell, and Dr. Castell and Dr. Borden was the—

Q. He handled the case from then on? A. Yes.

By the Court:

Q. The doctor at Garfield did not handle it? A. No, sir. This was an intern at Garfield that took care of him when he first cut it.

By Mr. Lynch:

Q. Did he later go to the hospital for operations? A. Yes. Dr. Borden performed an operation.

Q. How many different operations did he perform? A. He had two operations trying to sew the tendons together so he would not lose his finger. Then the third operation they cut his finger off.

Q. Did you see him in the hospital on those occasions? A. Yes, sir.

Q. Both from what you saw and from your professional knowledge as a nurse was this the type of injury
50 which would cause pain? A. Yes. A great deal of pain.

Q. During the time when he would be in the hospital what would be the condition of his hand? Would it be bandaged or would it be otherwise? A. Yes. It was bandaged and mostly in a splint from the elbow down for several weeks.

Q. Before this accident what was the condition of Mr. Varner's health? Was it good or bad? A. Good health.

Q. Now, Mrs. Varner, did you ever have anything to do with the spigots or the handles of the spigots in the bathroom tubs, you yourself? A. No, sir, except when I went to take a bath.

Q. You never attempted to fix them or adjust them or anything else? A. No, sir.

Q. By the way, when you went in and found that Mr. Varner had cut his hand, do you recall if the cold water spigot was running? A. Yes. It was running.

Q. Did you observe the hot water, the handle of the hot water faucet? A. It was broken.

Q. Was it in the position where it had not been
51 turned on? A. Yes.

The Court: The cold water spigot was on? It was the hot water spigot that broke?

Mr. Lynch: That is right, if your Honor please.

The Witness: Yes, sir.

Mr. Lynch: The porcelain had broken.

The Witness: Yes.

By Mr. Lynch:

Q. I show you this handle, a porcelain handle with a shiny metal end, and ask you if that resembles the spigot.

A. Yes, sir.

The Court: It was not a wheel valve?

Mr. Lynch: I don't know what kind of valve they call it.

The Court: One that turns up and down. It was not a wheel?

Mr. Lynch: Oh, no.

The Witness: No, sir.

Mr. Lynch: It was an upright handle. I am going to identify it more definitely later, and offer it in evidence, if your Honor please.

* * * * *

Q. Mrs. Varner, can you recall now how that
52 spigot, in what position that spigot would be when the water would be turned off? A. Yes. The handle straight up. The cold and hot water both were straight up.

Q. In other words, they would be in a perpendicular position when it was turned off? A. Yes. And when you turned it on, it turned down.

Q. It turned to one side like that (indicating)? A. Yes, sir.

By the Court:

Q. Did it go all the way around? A. About half way.

Q. At a right angle? A. Lots of times after the janitor would fix it you could turn it a little bit further at times than you could other times. I mean, it would go further down.

Q. It was not a shower bath? A. No, sir. Just a tub.

By Mr. Lynch:

Q. Can you tell whether or not there was a crack in that porcelain? A. Yes. There was a crack in it.

The Court: When?

By Mr. Lynch:

53 Q. For how long a period of time before this accident had that crack existed? A. Oh, for quite a long time.

Q. Would you say for at least a year? A. Oh, yes.

By the Court:

Q. Who told you about that? A. I beg your pardon?

Q. Who told you about that? A. About the crack in the handle?

Q. Yes. A. We observed it.

Q. When? A. I don't know the exact time. It was a little while after we had been living there when we noticed it. I didn't notice it when we first went in, because I didn't look that close at the apartment.

Mr. Lynch: You may examine.

Cross Examination

By Mr. Arth:

55 Q. I wanted to ask you about the time that you said Branham came up and put the new washer on the spigot. When was that? A. Branham came up several times.

Q. Yes, but I am speaking— A. Just before the accident?

Q. —of the last time that he came there and put one on. A. That was Saturday night.

* * * * *

56 Q. Were you in the bathroom while he was renewing the washer? A. No. I went in there with him, but I didn't stay.

Q. Do you recall his being in there on Friday, the day before? A. No, sir. He was in there on Saturday evening.

Q. No. I am asking you, Do you recall his being in there on Friday? A. Branham?

Q. Yes. A. He was in there a couple of weeks before, but not that Friday that I remember.

* * * * *

57 Q. He was not in your apartment on Friday? A. I can't say he was not in the apartment.

Q. Not in your apartment? A. But he was not working in the bathroom.

Q. What else would he do except change the washer? A. Lots of times our screens, something would get wrong with them, or the blinds.

Q. I am speaking of the washer on that bathroom fixture. A. Absolutely.

Q. So that Branham did not renew that washer on Friday? A. Not that I recall.

Q. You say that he was there on Saturday night? A. Yes, sir.

Q. What time? A. Around 6 o'clock. I don't know exactly.

Q. Was Mr. Varner home? A. Mr. Varner came home while Branham was there?

Q. Did he talk with Branham? A. Yes, sir.

Q. Were you present during their conversation? A. I was for part of it. Not all of it.

Q. Now, Mrs. Varner, are you absolutely sure that
58 Branham did not go in there on Friday—

* * * * *

A. Branham was not in there, as I recall, on the Friday before the accident. It was on the Saturday that he was in there.

By Mr. Arth:

Q. Did you have a maid? A. Yes, sir.

Q. Were you out on Friday? A. I don't recall.

* * * * *

59 Q. Do you recall on Monday Mr. Vito's man came to the apartment? A. After the accident a plumber came up.

Q. On Monday? A. I don't know whether it was Monday or not.

And he reseated the valve? A. I don't know what he did, because I don't know that line of work.

Q. Were you there when that was done? A. When the plumber was there?

Q. Yes. A. I was in the apartment.

* * * * *

By the Court:

Q. I have a note here that on Thursday, October 19th, you complained to Branham. Was it Gregory that you complained to or Branham? A. Gregory. We always complained to her when we had complaints.

Q. Was it on Thursday? A. I don't know whether it was on Thursday or not. I don't recall the days.

Q. So it was Gregory that you complained to every time? A. Yes. We always complained to her, because she was the resident manager. Branham was the janitor.

By Mr. Arth:

Q. Didn't you see Branham in the hallway on Thursday and tell him that your spigot was leaking in the bathroom? A. I don't recall.

Q. You don't recall? You might have done it, though? A. I don't recall.

* * * * *

61 Q. Didn't Branham tell you that it still leaked a little bit, but that it would take up; and if it didn't, to let him know and he would put another on? A. I don't recall.

Q. That might have happened? A. I beg your pardon?

Q. That might have happened? A. Not that I remember of it.

* * * * *

63 Q. Do you recall when Mr. Varner called Mrs. Gregory from the apartment? A. Yes. He was there within two weeks before the accident. I don't recall the day or just how soon before the accident.

Q. He told her that the spigot was leaking? A. Yes, sir.

By the Court:

Q. That was the leading complaint, that the spigot was leaking or dripping? A. Yes. And Mr. Varner had complained about the crack being there.

By Mr. Arth:

Q. You say Mr. Varner complained about the crack being there? A. Yes, sir. Whenever it was leaking.

Q. Were you with him when he complained of that? A. I heard him when he called over the phone, but I didn't go with him when he went over and complained more about it.

Q. How long before was that? A. That was within the two weeks.

Q. Within the two weeks. Was it on the occasion that you say that he called her to ask her to have new washers put on, that the spigot was leaking? Was it that same
64 time? A. You mean about the handle?

Q. Yes. A. Oh, we had complained about that several times.

Q. Were you with him when he did it? A. Not every time, no, sir, because I had other things—

Q. You continued to use the handle, did you not? A. Yes, sir.

By the Court:

Q. Why did you complain? A. Well, it always leaked. Then it had a crack in the handle.

Q. Why did you complain about the crack in the handle? A. Well, we wanted a new handle that was not cracked.

By Mr. Arth:

Q. Which handle do you say was cracked? A. The handle to the hot water heat.

Q. And did you tell her that it was the handle to the hot spigot? A. Yes, sir.

Q. And nothing was done about the handle? A. No, sir.

Q. When Branham came up to fix it and Branham put a new washer on, did you observe that the water was still leaking in that faucet? A. I don't recall whether it was still leaking after he finished with it or not.

Q. Did you talk with him afterwards? A. Not
65 any more. He just said he was through, and he left, and that was all.

Q. And he didn't say anything whether it was still dripping or not? A. No, sir.

* * * * *

66 Q. Do you recall talking with Mrs. Gregory a few
days after the accident? A. Yes. Either Tuesday or
67 Wednesday. I don't recall. One day that we washed
and we met in the basement.

Q. Do you remember calling up and asking her to have a new handle put on one of the faucets? A. After this happened she told me that the plumbers were coming up—

Q. Pardon me, madam. Didn't you ask her to put a new handle on the other spigot? A. She told me that they were going to change them all.

Q. No. I am asking you, didn't you ask her— A. I don't recall.

The Court: Wait a minute. Let him finish his question.

By Mr. Arth:

Q. (Continued)—to put a new handle on the other spigot, because there was a little crack in it, and you were afraid that it might break, because there was no crack in the handle on which Johnnie cut his hand? A. There was a crack on the handle—

The Court: No. Please answer his question.

Read the question. Listen to what the reporter says and answer his question.

(The reporter read the last question, as follows:)

68 “Didn’t you ask her to put a new handle on the other spigot, because there was a little crack in it, and you were afraid that it might break, because there was no crack in the handle on which Johnnie cut his hand?”

A. I did not.

By Mr. Arth:

Q. Did you have any conversation with Mrs. Gregory regarding the replacing of new handles on that fixture? A. After the accident?

Q. Yes. A. Well, she has told that they were going to change the handles.

Q. But you did have a conversation? A. Yes.

Q. Well, they put on a porcelain handle in the place of the one that was broken? A. Yes, sir.

Q. And that continued to be on there until the next year, isn’t that true, and you had porcelain handles there, and you continued to use those? A. I don’t recall whether they put porcelain handles on or whether they put on metal.

Q. Well, you know that metal handles were put on in the next year, in 1940, don’t you? A. I don’t recall what time they were put on.

Q. Mrs. Varner, how long had you noticed prior to the two weeks before this accident that there was a crack
69 in the hot water handle? A. I don’t recall.

Q. Was it a long time? A. Well, it had been there for quite a while, the crack in the handle there.

Q. That is, quite a while to the time when you complained about it? A. The crack had been there for a long time.

* * * * *

70 Q. Did the servant and Mr. Varner continue to use that handle? A. Yes.

Q. Did your son continue to use the handle? A. Before it was broken we always used it.

Q. You mean, before the accident? A. Before he cut his hand.

* * * * *

72 Recross Examination

By Mr. Arth:

* * * * *

73 Q. Isn't it a fact, Mrs. Varner, that Mrs. Gregory told you Sunday afternoon, when you were back from the hospital, that she would have the plumber come next morning and put a new handle on there and also reseal those valves? A. I don't recall.

* * * * *

Harry Goldstein

was produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lynch:

Q. Mr. Goldstein, give the Court and jury your full name, please. A. Harry Goldstein.

Q. Your residence is what? A. 131 Webster, Northwest.

* * * * *

74 Q. Did you have occasion to employ Mr. Varner in the fall of 1939? A. Yes, I did.

Q. You were then building a store up on Upshur Street, were you not, Mr. Goldstein? A. Building fixtures for a store.

Q. Counters and things of that kind? A. Yes.

Q. Did Mr. Varner work for you? A. Yes, he did.

Q. Can you recall the weeks he worked for you? A. He worked the week of October 9, 1939, and the week of—Suppose I give you the week ending for each week.

Q. Yes. Also give the amount of money that you paid him.

By the Court:

Q. Specifically he worked the week ending October 9th? A. Ending on the 14th, and the week ending the 21st, and the week ending the 28th.

By Mr. Lynch:

Q. How much did you pay him those weeks, Mr. Goldstein? A. The week ending the 14th, \$63.75. The
75 week ending October 21st, \$87. The week ending October 28th, \$25.

Q. On the week of the 28th, Mr. Goldstein, the one that you show a very small pay, what did he do then? A. The week of the 28th he had been supervising. At that time he was injured.

* * * * *

77 Q. Did he do any manual work that week for you? A. No. He did not.

Q. Did he put in full hours there or just part time?
78 A. Well, I would say he put in pretty near the regular time.

* * * * *

Cross Examination

By Mr. Arth:

Q. Mr. Goldstein, did you have any contract with this man? A. No, I did not.

Q. You merely hired him as a carpenter; isn't that
79 right? A. I hired him on the regular scale that the carpenters were getting, so much per hour.

* * * * *

80 Q. How soon after he was injured did he finish the job, Mr. Goldstein? A. Well, the following week.

Q. The following week? A. He had it all done in a week, rushed through in a week, because I hired these additional men, and they put it through.

Q. And he was there during all that week as an overseer; is that correct? A. That is correct.

* * * * *

81 Q. Didn't you ask him to get more men on the job; that it was not going along fast enough at that time?

A. I did mention to him that the way he was progressing I didn't think we could have it done in time; to get more men.

Q. It was costing more than you expected it to; isn't that correct? A. Well, I guess it did cost more than what I figured. You can't always figure right down to what it is going to cost.

Mr. Arth: I think that is all.

By the Court:

Q. Did he tell you before he was hurt that he would have to put more men on to rush it through? A. Yes. And I told him he had better get somebody else to help him.

* * * * *

82 **Dr. Robert E. Coker, Jr.**

was produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lynch:

Q. Your full name? A. Robert E. Coker, Jr.

Q. You are from George Washington Hospital, are you not? A. Yes.

Q. Did you produce certain records in response to a subpoena? A. Yes.

83

Q. They are the records of George Washington Hospital? A. On Mr. John E. Varner.

Q. May we have them? Leave them here and we will be sure that you get them back. A. I am not authorized to give them up.

* * * * *

84

Dr. Richard B. Castell

was produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lynch:

Q. Doctor, give the Court and jury your full name. A. Richard B. Castell.

Q. You are a practicing physician in the District
85 of Columbia? A. Yes, sir.

Q. And have been for how many years, Doctor? A. I guess, thirty-six.

Q. That long? A. Not that long. I mean since 1936.

Q. Did you have occasion to treat Mr. John Varner in October of 1939? A. Yes. I don't know the specific date, but it was about two years ago.

Q. Do you recall whether you saw him the same day he was injured or not? A. I am not quite certain about that. It was either the same day or the day after. He had been repaired when he came to me.

Q. What was the condition of his hand, Doctor? A. The history, he had gone to turn on or off a valve—

Mr. Arth: I object to that, if your Honor please.

The Court: Only tell what condition his hand was in.

A. (Continued) He had a cut hand here (indicating).

By Mr. Lynch:

Q. What part of the hand? A. The right hand on the palmar surface. He didn't have as much motion of this finger (indicating) as I thought he should have.

86 By the Court:

Q. What finger do you mean? A. That would be the right ring finger.

By Mr. Lynch:

Q. What part of the hand was cut, Doctor? A. It was this internal part just above the finger here (indicating).

Q. In the palm of the hand? A. In the palm.

Q. Did you see him thereafter from day to day? A. I saw him several times there, and referred him to a surgeon, because I felt that the tendons had been damaged, and I felt that he should have surgical care for that.

Q. And did you refer him to anyone? A. To Dr. Borden, Dan Borden.

Q. Is Dr. Borden a surgeon in the District of Columbia? A. Yes.

Q. Doctor, can you look at these hospital records. They are, Doctor, George Washington Hospital records, are they not? A. I presume so.

Q. Will you look for the earliest ones there? Pick out the earliest one first. A. Yes.

Q. And tell us when he went in the hospital and when he left.

* * * * *

87 The Witness: Admitted 11-3-39.

By the Court:

Q. That is where? A. George Washington University. Date of discharge 11-4-39.

The Court: Discharged November 4, 1939.

88 By Mr. Lynch:

Q. Can you tell by looking at that, Doctor, whether he was operated on while he was there that first time? A. Yes, sir. His operation was on 11-3-39, "Suture of tendons, Dr. Dan Borden."

By the Court:

Q. Operation 11-3-39, the day he was admitted. Suture of tendons? A. Suture of tendons, Dr. Dan Borden.

By Mr. Lynch:

Q. Did he have an anesthetic when that was done, Doctor?

* * * * *

A. "Anesthetic, gas and ether by Dr. Speidel."

By Mr. Lynch:

Q. When was he operated on again, Doctor? Or when was he in the hospital again? Let us put it that way. A. The next date is "Date admitted, 12-8-39."

Q. When was he discharged, Doctor? A. 12-9-39.

By the Court:

Q. What did they do to him then? A. "Repair of severed tendons, Dr. Borden."

89 Q. And the anesthesia? A. Avertin and gas.

Q. What kind of stuff? A. Avertin. It is a rectal anesthesia, and gas on top of it. The anesthetist was the same, Dr. Speidel.

By Mr. Lynch:

Q. That is a general anesthetic, isn't it? A. That is general. Avertin and gas. They usually have to support that with a little gas.

Q. When was he there again, Doctor? A. The next admission is 2-13-40.

Q. When was he discharged? A. 2-14-40.

Q. What was done then? A. An amputation of the ring finger, right, by Dr. Borden.

Q. Does it show where? A. The third or ring finger of the right hand was amputated, with long anterior flap at the proximal phalangeal articulation. The proximal phalangeal articular surface was removed.

Q. Where is that in ordinary lay language? A. That just gives him a little bit of this first joint. I haven't finished reading that. That would give him a little bit of the first phalanx.

The Court: Couldn't you look at his finger better and tell:

The Witness: Oh, yes.

(The plaintiff stood in front of the witness chair.)

The Witness: They usually take off the articular surface, which was done here, including the condyle.

"The stump was closed with long anterior flap."

* * * * *

By Mr. Lynch:

Q. Doctor, did Mr. Varner suffer both before the operations and during the operations—would that cause pain? A. Certainly. Any injury would cause pain.

* * * * *

91 Mr. Lynch: If your Honor please, at this time I wish to offer in evidence the lease dated February 17, 1937, by and between H. L. Rust Company, a corporation, organized under the laws of the District of Columbia, party of the first part, and John E. Varner, party of the second part, for the rent of this apartment commencing the fifteenth—

The Court: The Rust Company?

Mr. Lynch: Yes, sir. They were the agents.

The Court: That is exhibit 1.

Mr. Lynch: Plaintiff's Exhibit 1.

* * * * *

Mr. Lynch: May I call the jury's attention to certain parts of the lease?

The Court: Yes.

Mr. Lynch: I don't think it is all admissible. The part that I wish to call to your attention is the part which shows

various duties and the obligation of the landlord on the one hand and the tenant on the other hand. We finally get down to the part which says that all repairs rendered necessary by the negligence of the party of the second part, Mr. Varner, shall be paid for by the party of the second part.

The Court: Who is the second party?

Mr. Lynch: Mr. Varner.

The Court: The plaintiff?

Mr. Lynch: Yes.

“that all repairs rendered necessary by the negligence of the party of the second part shall be paid for by the party of the second part.”

And then the next to the last paragraph: “The party of the first part”—the landlord—“or his representative may enter the said apartment at any reasonable hour to protect said apartment against the elements or accidents,
93 and the party of the first part shall have the right at reasonable hours to show the premises described herein to persons desiring to inspect with a view to leasing within thirty days before the expiration of this agreement.”

Will you mark that, Mr. Reporter?

(The lease was marked “Plaintiff’s Exhibit 1.”)

Whereupon

John E. Varner

the plaintiff, was produced as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lynch:

Q. Your full name is John E. Varner? A. John Elvey Varner.

Q. You resided at 133 Webster Street, Northwest, in the year 1939? A. Yes, sir.

Q. This lease indicates that you went there in February, 1937. Do you recall if that is about correct? A. Yes, sir.

Q. You had occupied the same apartment from the time you first entered there until you moved? A. Yes, sir.

Q. Do you recall an occasion when you had an accident, when you injured your hand? A. Very much.

Q. All right, sir. Now, I will ask you also where you were working, where you had been working the week immediately preceding—What day of the week did it happen on? A. I was working at the Mellon Art Gallery.

Q. What day of the week did the accident happen on? A. On February 22nd.

By the Court:

Q. October 22nd, you mean? A. I mean, October 22nd.

By Mr. Lynch:

Q. What day of the week was that? A. It was on a Sunday morning.

Q. Had you been working for Mr. Goldstein the week previous? A. I got up early in the morning to go to work. That is the reason why I was going to take a bath before going to work.

Q. Tell the Court and jury just how you injured your hand, what you did, and how it was that the injury occurred, in your own way. A. I was working for Mr. Goldstein, and I worked late Saturday night, until 1 o'clock Sunday morning, and when I got home it was too late to take a bath.

So I went to bed and got up the next morning at 6:30
95 to go back to work, and I was sitting in the bathroom on the commode, just resting, waiting for the tub to get full of water.

I turned on the cold. It was in the summertime, and it was a little too chilly to—it was summertime, and a little too chilly for the hot water to burn. So I had turned on the cold water. And I reached over to turn on the hot water. When I did, why, it broke in my hand.

Q. It broke in your hand? A. That is all.

Q. And cut it? A. Yes, sir.

Mr. Lynch: If your Honor please, I would like for the plaintiff to go down and show the jury his hand.

The Court: Yes. But I would like to ask something.

By the Court:

Q. How far did you have to reach? You said you reached over while sitting on the commode? A. Yes.

Q. Was it at arm's length from the tub? A. It was just here, like this (indicating), so that I could just reach over. The commode is here (indicating), and the bath tub is right here (indicating).

Q. Did you have to stretch your arm far? A. No.

Q. Just reached your hand over? A. Just reached
96 easily.

Q. Was that just next to you—the hot water faucet? A. Yes, sir.

Mr. Lynch: May he come down and show the jury?

The Court: Yes, indeed.

Mr. Lynch: Come down, Mr. Varner, and exhibit your hand to the jury. Just hold it out here so that the jury can see it.

(The plaintiff exhibited his hand to the jury.)

Mr. Lynch: Take the stand again.

(The plaintiff resumed the witness stand.)

By Mr. Lynch:

Q. Mr. Varner, at the time when you took hold of the handle of the spigot what position was the handle in? A. They were both stuck straight up like that (indicating).

Q. Perpendicular? Upright? A. Yes, sir.

Q. Now, when you took hold of it and turned it, did it move or not? A. I turned the cold water on.

Q. No. The hot water I am speaking about. A. Then I got ahold of the hot water, and I was turning it, and it broke, and that is all I know.

97 Q. Did the water come on? A. No, sir.

By the Court:

Q. You first shut off the cold water? A. No, sir. The cold water was running, and I was sitting there kind of dopey from working all night, and I knew the hot water wasn't on.

Q. Did you shut off the cold water and then turn on the hot? A. No. It was still running. I knew I hadn't turned on the hot. I started to turn on the hot, and the handle broke in my hand.

By Mr. Lynch:

Q. What pressure did you use when you turned that? I mean by that, describe to the jury just how you took hold of it. A. I just got ahold, reached over and got ahold of the cold water and turned on the water, sitting there with my hand like that (indicating) for a few minutes. I was thinking about—

Q. Don't tell what you were thinking about. Tell what you did there. A. Just thinking, I guess.

Then I knew the hot water wasn't on; so I turned on the hot water, and as I turned it the handle broke in my hand.

By the Court:

Q. When you say that you were sitting there thinking, do you mean with your head down without looking?

98 A. No, sir. I turned on the cold water first, because when you turn on the hot water first, the steam flows—

Q. The cold water was running when you— A. Yes.

By Mr. Lynch:

Q. When you turned on this hot spigot and that broke in your hand, did you turn that on in the same manner and

way that you turned on the cold water spigot? A. It did not turn on. It broke in my hand.

Q. When you attempted to turn that on, did you use the same pressure? A. The same thing.

Q. Did you use ordinary pressure that one would use to turn on a spigot? A. The same as I always used. Just grabbed hold of the spigot and turned it on, sir.

Q. Let me show you this handle of a spigot and ask you if you can identify that (handing an object to the witness). A. Yes, sir.

Q. Is that the one that you turned on or attempted to turn on that morning? A. Yes, sir. That is the one.

Q. Speak louder. A. That is the one. Yes, sir.

Mr. Lynch: I offer it in evidence, if your Hoonr
99 please.

Mr. Arth: No objection.

(The handle referred to was received in evidence as Plaintiff's Exhibit 2.)

Mr. Lynch: I would like to show that to the ladies and gentlemen of the jury.

(Mr. Lynch passed in front of the jury holding the handle in his hand and showing it to the jurors.)

By Mr. Lynch:

Q. After you realized that the handle of the spigot had cut your hand, you called your wife and went to the hospital, as your wife has indicated? A. That is right.

Q. Now, Mr. Varner, I will ask you whether or not before this accident you had seen anyone in the bathroom attempting to repair the spigots on the tub.

* * * * *

A. On Saturday evening, when I came in from work, we was sanding the floors in the shop that we were going to put in—

By the Court:

Q. Sunday evening? A. Saturday evening. I beg your pardon. I have a cold.

Q. Saturday evening what happened? A. Yes.

By Mr. Lynch:

100 Q. What time was it? A. Around 5 o'clock.

Q. Was anyone there? A. Branham was working on the tubs.

Q. The spigots of the tubs? A. Yes.

Q. Did you go in there? A. Well, I had a reason to go in, because Branham was supposed to come and sweep the place up, and I asked him why he did not come, and he said that Mrs. Gregory had him fixing the tub.

Q. You mean Branham, the janitor? A. That is correct.

* * * * *

101 Q. At that time he was working on the spigots?

A. That is right.

Q. And what did he say? A. He said that he had some work that Mrs. Gregory had given him, and he was sorry that he couldn't come; that he would come tomorrow morning. That would be—

Q. That would be Sunday? A. Sunday, which I was going to work.

Q. You were going to work on Sunday morning too? A. That is right. I phoned the union and got permission to work. They told me I could work.

Q. Did you use those tubs after he had fixed them that evening up until the time that you attempted to use them the next morning? A. No, sir. I washed my hands in the kitchen sink and my wife and I ate dinner, and I went to work.

Q. Before this night on Saturday, October 21st, had Branham or anyone else at any time when you were attending the apartment ever come in and fixed or repaired any spigots? A. Branham was the maintenance man around

there. He did everything that was to be did around there with the exception of the painting—

Mr. Arth: Will you talk a little louder?

The Court: He said Branham was the maintenance man, and he did what?

102 A. (Continued) He did everything that was to be done around the apartments, with the exception of papering and painting. He never did that.

* * * * *

By Mr. Lynch:

Q. Now, Mr. Varner, had you ever talked to Mrs. Gregory, the resident manager, about these spigots? A. Yes, sir.

103 Q. In the bath tub? A. Yes, sir.

Q. When did you talk with her before the accident, if you recall? A. The whole situation was, Mr. Lynch—

Q. No. Answer the question. Can you tell about when it was before the accident that you talked with her and told her about the spigots being dripping or needing fixing? A. I couldn't be positive, but it was at least a week or a little longer before they ever fixed them up before I broke the faucet the last time. But those faucets had leaked numbers of times before that.

Q. Had they come there and fixed them? A. They never did a thing; only came up and put in the faucet rubbers to prevent the leak.

Q. He had come up and repaired them from time to time, Branham had? A. Branham did all the plumbing in the apartment. I don't know about the building.

By the Court:

Q. What was the trouble with these faucets?

Mr. Lynch: He is not a plumber, your Honor.

The Court: He knows whether they leaked or not.

A. Your Honor, at nighttime you could lay in bed and you would hear drip, drip, drip, drip.

The Court: That is what I wanted to bring out.

104 Mr. Lynch: I thank your Honor.

By Mr. Lynch:

Q. Mr. Varner, did you at any time ever do anything to those spigots? A. Never touched them.

Q. Did you ever attempt to repair them— A. No.

Q. —or do anything with them or touch them, except to turn the water on or off? A. No, sir. Never bothered with the spigots.

Q. Did you observe a crack in this spigot? A. Well, I can't recall just when it was, Mr. Lynch; but it was in there, and Mrs. Gregory was told about that. She said they were going to put new spigots and faucets over the whole apartment.

Q. That was before the accident happened? A. Some time; yes, sir.

The Court: Who said that? Mrs. Burke?

The Witness: Mrs. Gregory.

By Mr. Lynch:

Q. Now, Mr. Varner, you went to George Washington Hospital? A. Yes, sir.

Q. How many times were you there? A. Three
105 times.

Q. Did Dr. Castell treat you, the doctor who was on the stand? A. Dr. Castell looked at my hand first and said I would have to have a surgeon.

Q. Did Dr. Castell give you a bill? A. Yes, sir. You have it.

Q. I don't have it here. Do you recall how much it was? A. \$39.

* * * * *

Q. Did you receive a bill from Dr. Borden? A. \$150 or \$147. That is it (indicating).

Q. \$147 (showing a paper to the witness)? A. That is right.

* * * * *

106 The Court: Dr. Borden, \$147. What else?

Mr. Lynch: That is right. And Garfield Hospital, \$3. One bill from George Washington Hospital for \$33. I don't have the other bill, but I am going to prove it right away.

By Mr. Lynch:

Q. How much was the total hospital bill, Mr. Varner? A. At the time it was around \$33 or whatever it may have been. I gave a check for it the first time.

Mr. Arth: You did what?

The Court: The first time it was \$33, and he gave a check.

The Witness: Yes.

By the Court:

Q. What was the second one for? A. I don't know. I haven't paid them.

By Mr. Lynch:

Q. Do you remember how much they were? A. They never sent me the bill. I thought the insurance company would take care of it, I guess.

Mr. Lynch: That is all right. Don't let us get that.

Now, if your Honor please, I have here the amounts—

Mr. Arth: What was his statement? I didn't hear it.

The Court: It doesn't mean anything. He doesn't know what he is talking about.

The Witness: I have accident insurance.

The Court: He says he has accident insurance.

107 Mr. Arth: Or, I was wondering what he was talking about.

The Court: He didn't say it in that way.

Mr. Arth: May we come to the bench?

The Court Yes.

(The following proceedings were had at the bench, out of hearing of the jury:)

Mr. Arth: He said that they never sent him a bill; that he thought the insurance company would take care of them, he guessed.

The Court: He said he has accident insurance of his own.

The Witness: I am carrying Masonic insurance and accident insurance.

By the Court:

Q. Was that accident insurance? A. Yes.

Q. How much? A. \$500.

Q. Do you know whether they have taken care of that?
A. I never heard anything from it.

Q. Did you send the bills through? A. Yes, sir.

(Whereupon proceedings at the bench were concluded.)

Mr. Lynch: Two bills, if your Honor please. December 8, 1939, \$37.50.

The Court: For whom?

108 Mr. Lynch: George Washington Hospital.

* * * * *

The Court: Will you step up here a moment?

(The following proceedings were had at the bench, out of hearing of the jury:)

The Court: He says that he had accident insurance, and he sent these two George Washington bills to them, sent them to the insurance company, and assumed that they would take care of them. So I don't see any necessity of proving them.

Mr. Lynch: Oh, absolutely, if your Honor please, because even if they were—

The Court: They would be subrogated to his rights.

Mr. Lynch: No, your Honor. Absolutely not. I can positively show you from every judge here on the bench, and it is the law. He is entitled to his salary from the people who caused the injury.

The Court: I am not talking about salary. I am
109 talking about bills.

Mr. Lynch: About doctor bills?

The Court: Hospital bills. He sent the doctor bills to this insurance company. That is what he said.

Mr. Lynch: I don't know anything about that.

The Witness: I said I didn't know whether they were paid or not.

Mr. Lynch: It doesn't make any difference. I submit that he is entitled to get them anyway.

The Court: You are not entitled to them if the insurance company has paid them.

Mr. Lynch: I don't know whether they have paid them or not.

The Court: It is just a question of subrogation.

Mr. Lynch: I will have to bring them back to show that.

The Court: If you know what they mean, I have no objection to it. He let out something about insurance.

Mr. Lynch: Let us do this, if your Honor please: I will allow Mr. Arth to call up the George Washington Hospital and find out if they have been paid.

Mr. Arth: I don't want to call them up.

Mr. Lynch: Then I will bring them back here this afternoon.

Mr. Arth: It is not my place to bring anybody back.

Mr. Lynch: I will bring them back this afternoon.

The Court: Bring whom back?

110 Mr. Lynch: Bring the George Washington man to show about these bills. If he does not want to concede that and he doesn't want to call them, I will do it.

Mr. Arth: I understand that he sent them to somebody.

Mr. Lynch: I will take care of the bills. If you don't want to concede the bills, I will bring the George Washington man back.

(Whereupon proceedings at the bench were concluded.)

By Mr. Lynch:

Q. Now, Mr. Varner, your occupation is what? A. I am a cabinet maker and a carpenter, sir.

Q. How long have you been in that trade? A. 22 years.

Q. How much were your wages on October 22nd? A. Thirteen dollars.

Q. Thirteen dollars? A. Yes.

By the Court:

Q. Are you a union man? A. Yes. Carried a card for 22 years.

By Mr. Lynch:

Q. How much did you get for overtime? A. Double time.

Q. Double time for all overtime? A. Yes. And time and a half for all government work.

* * * * *

111 By the Court:

Q. What time was it that you had time and a half? A. Time and a half at the present date on all government work defense work.

Q. Are you working on defense work? A. Not working on it right now?

Q. You get time and a half? A. Yes. Right now—

Q. And double time. You get time and a half for government work? A. Yes.

By Mr. Lynch:

Q. How long were you out of work, Mr. Varner, as a result of this injury that you received to your hand? A. I have never been out of work, Mr. Lynch.

Q. Were you working in October, November, and December, 1939, after the injury to your hand? A. No, sir.

Q. I am asking you how long you were out of work as a result of injuring your hand. A. I were out of work—I think I went to work for the Charles H. Tompkins in, it was May sometime. I can't remember positively.

112 Q. The first part or the last part of May? A. It was around the middle.

Q. Around the middle of May? A. 1940, sir.

Q. Did you work for Mr. Goldstein the week that you injured your hand, supervising something that he was doing up there? A. Yes. Mr. Goldstein asked me would I help him. He was starting in the ten-cent-store business, and I told him I would.

Q. Go ahead. A. So I went up. There was a lot of counters to be made, and he didn't want to buy counters. So I told him I would come. So he gave me a picture, and I started making the counters.

Mr. Arth: I can't hear the witness.

Mr. Lynch: Sit down here, Mr. Arth.

The Court: We want the jury to hear him, Mr. Lynch.

Mr. Lynch: I think the jury can hear him all right, if your Honor please.

By Mr. Lynch:

Q. Now, did you go up there, Mr. Varner? You don't need to go into details. Did you go up there and help Mr. Goldstein by supervising? A. Mr. Goldstein came up and showed me the store. He said he was starting to put a store in.

113 Q. Did you go up there on Monday or Tuesday or Wednesday immediately after you had hurt your hand, those days, shortly following that time? A. I went up there the next morning and told Mr. Goldstein I couldn't work.

Q. Go ahead. A. So he says, "What am I going to do?"

* * * * *

Q. Did you go up there and do anything? A. No, sir. I didn't do anything. I just told the men what to do and that was all.

114 The Court: You were the boss of it. You told them how to work.

* * * * *

By Mr. Lynch:

Q. Except for that \$25 that Mr. Goldstein paid you, did you receive any other money for any other time until you went back to work? A. No, sir.

Q. And worked regular? A. No, sir.

Q. Were you able to work? A. No, sir.

* * * * *

115 Q. How much would you have been able to earn during that time? A. Tompkins paid me \$70. Any other place pays a foreman \$70 a week. That is, for a lay-off man, to lay off work.

Q. Can you lay off work? A. I have done it for many years.

Q. Your base pay is \$70 a week? A. It depends upon the people you are working for, Mr. Lynch.

116 Q. How much are you making now? For whom are you working now? A. I am working for the Government.

* * * * *

Q. How much is your base pay? A. The lowest is \$85.

Q. \$85 a week? A. Yes.

Q. What is the highest? A. \$147.

Q. \$147 is the highest and the lowest is \$85? A. Yes. Here is the check right here in my hand.

* * * * *

118 Q. Mr. Varner, you gave us the amount received by a carpenter and a carpenter foreman. Were you a carpenter foreman or a carpenter? A. A carpenter foreman.

Q. \$14 a day? A. Yes, sir.

The Court: Fourteen dollars a day?

Mr. Arth: He said "thirteen" before.

Mr. Lynch: He said thirteen for a carpenter and fourteen for a foreman.

Mr. Arth: Yes, and now he is a foreman.

Mr. Lynch: He said he is a foreman, doing foreman work.

* * * * *

119 Mr. Lynch: By the way, if your Honor please, I
have checked on these bills. There is in evidence one
120 bill for \$33, and the check of Mrs. Varner in payment
for that \$33. The other two amounts from the George
Washington Hospital are \$37.50 and \$29.50.

The Court: That is, three bills?

Mr. Lynch: That is right. The first one has been paid.
The second and third have not been paid. The total is \$100
even for all the hospital charges. Mr. Arth concedes that
the records would show that if they were brought here.

The Court: All right.

By Mr. Lynch:

Q. Mr. Varner, at the time that you suffered and sustained this injury to your hand, tell the members of the jury whether it was painful and whether it continued to be painful. A. It was very painful, sir. The cut went in very deep, and it cut the tendon. The blood squirted up all over the bathroom. I grabbed my wrist like that (indicating).

Q. When you were at the hospital and they operated on it, was it painful then? A. I don't know. I was asleep.

Q. I mean, after you woke up. A. Very much painful. But to knock down expenses I went home the next day. My wife is a nurse. She took care of me.

Q. During the time you were around after you went home until the time you went back to work did you have
121 pain in your hand? A. It still pains me a little now.

I was talking to the doctor. He says it still has to be operated on for these adhesions. I can't close my hand.

Q. Show the jury how you can close your hand. A. (demonstrating to the jury) I can't close it normal.

Q. Do you have pain in it now? A. Very much. That is where the adhesions is—in there (indicating), and they closed that in.

Q. You have been advised to have another operation to relieve that? A. When work gets slack I will have it operated. Yes, sir.

Q. Can you grab a hammer and hold a saw as well— A. Not as good.

Q. —as effectively as you did before? A. Every time I take up a glass or something, I break it. I break all my wife's glasses and cups.

Q. It is necessary for you to hold a saw and hammer? A. Yes.

Q. Are you able to do that with your left hand? A. Not very good.

Q. To hold carpenter's tools? A. Not very good with the left hand. I do most of my work with it.

122 Q. Are you right-handed? A. I am still right-handed.

Q. Mr. Varner, I don't know whether I have asked you this question or not before, but to be sure about it: During the time that you were there in this apartment, from the time you moved in until the time this accident happened, had the janitor been in there before to fix those spigots on the bathtub? A. A number of times, sir.

Mr. Lynch: You may examine.

Cross Examination

By Mr. Arth:

Q. As a matter of fact, the janitor always came if you wanted him to, didn't he? A. I don't know what he did. He didn't do it for me. I never was there to watch him. But I know my wife told me—

Mr. Lynch: Not what your wife told you. A. (continued) —that Branham had been there a number of times and fixed the faucets.

The Court: Just your own knowledge.

The Witness: But I know, your Honor, three times.

By Mr. Arth:

Q. Washers, I am speaking of. A. Washers, no, sir. He came in and fixed the toilets when they had stopped up, and the kitchen sink had stopped up.

Q. But you were not there then? A. No, I was not
123 in there then. They had been put in while—

By the Court:

Q. The toilet and the kitchen sink were dripping? A. The toilet and the kitchen sink and the bathroom faucet handles.

Q. Handles? A. Yes.

Q. What did he do to the handles? A. Put in a washer.

Q. That is not the handles. You are talking now about the handles. A. You have to take the handle off to get in.

Q. That is not fixing it. You are not saying that he fixed the cracked handles? A. No, sir.

The Court: That is all right.

The Witness: No, sir.

By Mr. Arth:

Q. You had no contract with Mr. Silverman with Mr. Goldstein? A. Mr. Goldstein told me he had so much funds.

Mr. Lynch: Just a minute.

By Mr. Arth:

Q. You had no contract? A. Positively not. I
124 have no license to contract, sir.

* * * * *

125 Q. Mr. Varner, you had been an occupant of this apartment for three years approximately prior to this accident? A. Yes, sir.

Q. And you had used these fixtures steadily, had you not? A. Yes, sir. You have to have a bath.

Q. You said that Branham had always done the work there like changing washers? A. I don't know who authorized him to do it, but I know I called Mrs. Gregory and had Mrs. Gregory to have them fixed.

Q. You knew that Branham was there on that staff as janitor, was he not? A. In my apartment, yes.

Q. Did you ever complain to her that he was not doing his work right?

Mr. Lynch: I object to the question as immaterial.

A. I did not.

The Court: He has answered the question.

By Mr. Arth:

Q. What was the answer? A. I did not.

The Court: He said he never did.

126 By Mr. Arth:

Q. You say that this is the handle (showing the witness Plaintiff's Exhibit 2)— A. Yes, sir.

Q. —upon which you cut your hand? A. Yes, sir.

Q. Now, do I understand that that handle was up like this (indicating)?

* * * * *

Mr. Lynch: I just want the reporter to show what the witness did. He was explaining that when the water was turned off, Mr. Reporter, it was up, and turned down when the water was turned on.

By Mr. Arth:

Q. Do I understand that the handle sticks up like this (indicating) when the water is off? A. Yes, sir.

Q. And you turn it on this way (indicating)? A.
127 No, sir. That hot water turns this way and the cold water turns over this way (indicating). They turn opposite from each other.

By the Court:

Q. Surely. You just have that one handle and you use it to turn on the hot and the cold? A. No. There are two handles, one right opposite the other.

Mr. Arth: It comes out in one stream.

By Mr. Arth:

Q. Isn't that correct? A. That is right. Yes, sir.

By the Court:

Q. When you turned that (indicating) up, what was on? The hot water? A. Yes, sir. They both are straight up in the bath tub here.

By Mr. Arth:

* * * * *
129 Q. There are a couple of little cups back here, aren't there, sitting against the tub outside the fixture? A. No, sir.

Q. Little porcelain cups? A. No, sir. These were old-time fixtures.

Q. Old-time fixtures? A. That is right. Yes, sir.

Q. Whatever they were, this handle, you say, was upright? A. Just like that.

Q. Now, did you turn that on? You have to turn it this way? A. That is right.

Q. Which is to the left? Isn't that right? A. Yes, sir.

Q. Now, just what did you do? A. Sitting down on the commode, and I turned the cold water on. If I turned the hot water on first, the steam flies all over.

Q. I am just asking you what you did.

* * * * *
A. All right. I turned the cold water on. Then I let some of it get in the tub before I turned on the hot
130 water. Then I turned on the hot water, so that the steam wouldn't come all over the room.

Q. So the steam wouldn't come all over the room? A. Yes. But you would get only hot water. That is the only thing you do get.

Q. What time was that? A. It was around 7 or a little after in the morning.

Q. 7 or a little after? A. I couldn't say to be positive.

Q. You are quite sure it was not after 9 o'clock in the morning, aren't you? A. Sir?

Q. It wasn't after 9 o'clock in the morning? A. I don't remember to be positive what it was, sir.

* * * * *

131 Q. What time did you go to the hospital? A. It was not much after 9.

Q. Who took you there? A. Mr. Simonds.

* * * * *

132 Q. Let us get back to this spigot. Just how did you manipulate that spigot?

Mr. Lynch: I object to that, if your Honor please. The question has been asked and—Just a minute, Mr. Arth.

The Court: I am going to let him make one more
133 demonstration.

* * * * *

The Witness: I turned the cold water on first, and I am sitting there (indicating).

By Mr. Arth:

Q. How far is this handle? Is this handle back here where you are sitting? A. It is right in front, this way (indicating).

Q. Just like this (indicating)?

* * * * *

134 Q. Now, what did you do? A. I have the cold water going. I have the hot—I turned it on, and I couldn't grip it like that (indicating). It is turned on.

* * * * *

Q. Where did you touch the handle? Right down here (indicating)? A. Yes.

Q. With the back of your hand? A. Positively.

Q. Will you show the Court and this jury how you could have got hold of this handle with the palm of your hand? A. I don't know. But when I got hold of the bottom and

turned it over like that (indicating), this thing (indicating) was in my hand.

Q. What part of that cut your hand? A. This thing right here (indicating).

135 Q. This upper part? A. Yes, sir.

* * * * *

Q. Was that handle cracked all the way around there before you cut your hand? A. I couldn't say that it was, because I don't know. I didn't get down to look at the handle.

Q. You had been using it right along, hadn't you? A. Had used it for almost two years.

By the Court:

Q. You noticed the crack and you told her. Can
136 you show us where it extended, the crack that you noticed? A. (taking the handle from Mr. Arth) This whole crack here was the only crack that was in here, right across here (indicating).

Q. Right about there (indicating)? That is the crack? A. Yes, sir. These (indicating) was not in here at all.

Q. This "HOT" stood out in front of you? A. The "HOT" was facing the tub.

Q. Facing the tub so that you could see it? A. Yes.

Q. And this crack was right across here (indicating)? A. Yes.

Q. Through that word "HOT"? A. Yes.

By Mr. Arth:

Q. You say the word "hot" was facing the back of the tub? A. No, sir. Facing the face of the tub.

Q. It was facing the— A. As you walk in there, you could see "hot" and "cold." You try it and see if you don't cut—

* * * * *

Q. Is this blood on here (indicating)? Is that dry blood from your hand? A. I don't know, sir, what it is.
137 I know my hand went on this one (indicating).

Q. Is this blood on here (indicating)? Do you know? A. I wouldn't say.

Mr. Lynch: He said he didn't know.

By Mr. Arth:

Q. You took the handle off this spigot since you did it?

A. No, sir. The plumber took it off and gave it to me.

Q. Who was that plumber? A. Mr.—You people named his name a while ago, but I don't know what it is.

Q. Al Rhodes, wasn't it? A. I don't know his name. But he is the one that gave it to me.

Q. Al Rhodes, who works for Vito? A. I don't know his name. But I know he gave me the faucet handle. I asked him for it, and he gave it to me.

Q. You say you don't know whether that handle was cracked—

Mr. Lynch: He didn't say that, Mr. Arth.

A. I said, this part (indicating)—

Mr. Lynch: Just a minute.

Mr. Arth: I am cross-examining.

Mr. Lynch: I submit, if your Honor please—just a minute—

The Court: Put it another way. Go ahead.

138 By Mr. Arth:

Q. What is the answer? A. I said those busted-out places (indicating) wasn't in there. No, sir. I never seen them in there before.

Q. You never saw any crack in there before?

Mr. Lynch: He didn't say that.

Mr. Arth: What did he say?

A. I said, those busted-out places wasn't in the handle before.

By Mr. Arth:

Q. Which busted-out places? A. This busted-out place (indicating).

Q. Did you make any complaint to Mrs. Gregory about—
Wait a minute. Let me finish the question before you start
to answer. Did you make any complaint to Mrs. Gregory
at any time regarding the condition of the handles in the
bath tub fixture? A. I won't state whether I made any calls
to her or not about that, but I told her about that drip, drip,
drip, drip. That is all.

Q. The drip, yes. That is all you told her about? Is
that right? A. No. I have told her about the bathroom
being stopped up and about the kitchen sink being stopped
up.

Q. I am not talking about that. I am talking about
139 that fixture, about that bathroom water fixture. A.
I wasn't interested in fixtures. The only thing I was
interested in was the hot water or cold water when I wanted
it.

Q. And the drip, drip drip? A. That is right.

* * * * *
143 Q. What carpenter work did you do for Charles
Tompkins in 1941, in May? A. Form building. I
144 was steward on the job. I looked out for the men,
saw that they had cards and that the cards were paid
up.

Q. You got better pay for that then you did for carpenter
work, didn't you? A. Well, I got paid for it.

* * * * *

Q. How much salary did you get? A. \$65 a week.

Q. \$65. A. That is right.

Q. As what? A. As steward of the job.

Q. What were the carpenters getting? A. \$65.

Q. The same thing? A. That is right. But I didn't have
a thing to do.

Q. Was that the ordinary carpenter's wage? A. The
steward on the job has the preference of overtime.

Q. I didn't ask you that. A. I am telling you about it.

* * * * *

145 Q. How long were you on that job? A. I was over there at least three months.

Q. Then where did you work? A. Mellon Art Gallery and—

Q. As a carpenter? A. As a carpenter foreman.

Q. You did carpenter work, didn't you? A. Yes, sir.

Q. What was your pay on that building? A. \$70
146 a week.

Q. What is it now? A. The same thing.

Q. I thought you said you are getting \$100? A. If you get overtime, it runs up to \$100, \$112, up to \$147. That is the highest I have made in any one week, on the job I am on now.

* * * * *

151 Q. Were you there on Monday morning, at home?
A. Yes, sir.

Q. How long were you there? A. I left the house around 9 o'clock and walked up to Mr. Silverman's and told him I couldn't finish the job he asked me would I call the local and get someone. I called Frank Howard—

Q. I asked you, how long were you at your home? You say, until 9 o'clock? A. Around 9. I am sure it was that or later.

Q. Had the plumber been there at that time? A. No, sir.

Q. Were you there when he came? A. I wouldn't
152 be positive about that. I don't know, sir. I know they came there and put in all new faucets.

By the Court:

Q. Don't volunteer anything. He only asked you, were you there when the plumber came on Monday? Were you or not? A. I can't say. I don't know.

By Mr. Arth:

Q. Who did you get that handle from? A. The plumber.

Q. That same morning? A. I am not positive whether I got it on Tuesday or Wednesday. But I got the handle. I

came in and he was changing the, putting in all new metal fixtures in the bathroom.

Q. Metal fixtures? A. That is right.

Q. When did he put that metal fixture in the bathroom?

A. Beg your pardon?

Q. When did he put the metal fixtures in the bathroom?

A. He put in metal faucet handles.

Q. When? A. I don't know. That is when I got that spigot handle.

Q. Wasn't it the next year when he did it, after January; sometime in February or March of the next year? A. That is when I got that faucet handle, was when he came and put those spigot handles in there. He gave me that
153 broken part. I had the top piece, and the other piece I didn't have at all until he gave it to me.

* * * * *

Q. Was it shortly after the accident? A. I don't remember whether that was right shortly after or whether it was a week or two weeks or ten days or what it was. He gave me the important part of the handle. The top part was already there.

* * * * *

154 Q. When did you get this part here (indicating), the metal part? A. I am not positive whether it was the next day or two days or ten days or what it was. But I know I came in, came in from Jerger's beer parlor. The plumber was then there, and he started out with that thing, and I asked him for it, and he gave it to me.

* * * * *

155 Q. In the house? A. He came out of the bathroom into the living room.

Q. Do you know who he was? A. Did I know him?

Q. Yes. Know his name. A. No. I didn't know his name. I don't know your name either.

Mr. Lynch: Mr. Charles Arth.

Mr. Arth: Your Honor, I am trying to get a serious answer.

The Court: Go ahead. If you are entitled to it, you may have it.

By Mr. Arth:

* * * * *

158 Q. Do you recall when you next, after you injured your hand, do you recall when you next used the hot water handle in the bathroom, the fixture, when it was? A. No, I can't, sir. I do not know.

Q. Do you know what kind of handle was on it? A. I am not positive. I really do not know whether it was porcelain, metal, or what it was. I don't remember.

By the Court:

Q. Let me ask you this question: Did you use that bath tub with the handle in the condition that you see it here? A. No, sir.

Mr. Arth: I didn't hear that question, your Honor, until Mr. Crenshaw repeated it to me.

The Court: I am sorry. I didn't speak loud. I put the question in a little different way. I said, "Did you ever use that bath tub with the handle in the condition that you see it here?" as we see it here, that stubby piece, with it on the handle. And he said "No."

Mr. Arth: I see.

By the Court:

Q. I would like to have it clear for my satisfaction when it was that this plumber gave you that. Was it that night? A. I was sitting here thinking about it, whether it was—

Q. Can you recall definitely? Was it the same
159 week or was it a year after? A. No, sir. It was not a year, sir.

Q. Was it when they put on the new fixture? A. When they put on those metal fixtures.

Q. Metal fixtures? A. Yes.

Q. That is when it was? That might have been months, might have been a year, might have been a day? Is that true? A. I am not positive, sir, just when it was. But I am sure Mrs. Gregory can tell you when it was. She has the dates.

By Mr. Lynch:

Q. What is your best judgment as to when it was? How soon after the injury was it that they took it off and put on a different type of fixture? A. Sir, I am not positive about that. But I know it was not very long after this accident.

Q. Maybe days or a week? A. It was a matter of days. It was not a matter of months.

* * * * *

160 By Mr. Arth:

Q. Your family used this bath tub, did they not? A. I imagine they did, sir.

* * * * *

162 Q. Mr. Varner, since you have been back to work, which was May, 1940—is that right? A. Yes.

Q. —have you earned any less by reason of your accident?

* * * * *

A. I lost a couple of jobs because I couldn't accomplish my work on account of it.

* * * * *

(?)

Q. Where was that? A. At H. L. Hammy.

* * * * *

163 Q. When was that? A. That was after I got through with the Mellon Art Gallery. The first week after that.

Q. When did you get through with the Mellon Art Gallery? A. I worked three days and I got fired on account of

I couldn't hold my tools. It made me mad; so I went in and got another job as foreman.

* * * * *

Q. You still do carpentering work, don't you? A. I am steward right here for John McShane, and I am working every day, and I do his lay-work work.

Q. John who? A. John McShane. at the War Department.

* * * * *

Q. As a carpenter? A. As a carpenter over at the War Department.

Q. How much pay do you get there? A. Beg your pardon?

164 Q. How much a day? A. I get a dollar sixty-two and a half cents an hour.

Q. Is that regular carpenter's wages? A. Yes, sir. But I am the steward over there for him now.

Q. Since when? A. Ever since I have been on the job.

Q. How long has that been? A. It has been around two—a little over two and a half months.

Q. Steady? A. Steady. Yes, sir.

* * * * *

Q. You say you lost another job? A. I lost one outside of that.

Q. What was that? A. I don't care to mention it.

* * * * *

165 Q. What kind of job was it? A. Carpenter work.

* * * * *

Q. Where was that? A. Beg your pardon?

Q. Where was that? A. Repair work.

Q. Whereabouts? A. I don't think that has nothing to do with my case.

Mr. Arth: May I have an answer to my question, your Honor?

166 The Court: Yes. You may have an answer.
 A. (continued) 615 Sixth Street, Northwest.

By Mr. Arth:

Q. Was that the job you said you didn't care to mention?

* * * * * * * * *

A. That is the job you asked me about and I didn't care to mention where it was.

By the Court:

Q. I didn't get that yet. A. 615 Sixth Street.

Q. That is right around here. A. That is right. They had colored carpenters on there, and the union does not allow you to work with them. We had the right to work on there. That is the reason why I lost my job.

* * * * * * * * *

167 Whereupon **Maurice J. Colbert** was produced as a witness on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lynch:

Q. Mr. Colbert, your full name? A. Maurice J. Colbert.

Q. What is your occupation? A. Vice president of the Maurice J. Colbert Company, plumbing and heating contractors.

Q. How long have you been connected with the Maurice J. Colbert Company? A. Thirty-one years.

Q. You have been connected with them thirty-one years? I didn't know that you were that old.

The Court: He doesn't look that, does he?

By Mr. Lynch:

Q. Your father was president of that company and was active in it for many, many years? A. That is true.

Q. Your position with the company is what? A. Vice president.

Q. Their business is plumbing and heating? A.
168 That is true.

Q. Are you a registered plumber yourself, Mr. Colbert? A. Yes, sir.

Q. Are you familiar with water spigots, hot water spigots in bath tubs? A. Yes.

Q. You have been familiar with them for many years? A. Yes.

Q. You know how they work? A. Yes.

Q. You know how they are stopped from leaking if they are leaking? A. Yes.

Q. I will show you a spigot, Mr. Colbert. Mr. Reporter, it is the same one that has been offered in evidence here. Assume, Mr. Colbert, these facts as correct and true: that this spigot, this handle which I hold in my hands in two pieces put together was on a hot water spigot, faucet, in a bath tub; and that the spigots were leaking, and that there was a drip in the tub; and a janitor of the apartment building in which this spigot was located came to the building to repair it or fix it, and that he did something with the spigot—what was done is not known at this moment—but he did something with the spigot, so that, when he finished with the spigot, the drip had disappeared.

169 Assume further that the next day, when the spigot was attempted to be used, the following morning, that when it was turned or attempted to be turned, the person using ordinary pressure of their hands, as they would to turn a spigot, that the porcelain broke, and the spigot or the handle of the spigot did not move; remained stationary.

I will ask you whether or not under those circumstances you would say that the spigot had been repaired in a proper and careful manner or whether it had been repaired in a negligent manner.

Mr. Arth: I object, your Honor.

The Court: I can understand the objection. You are asking him to assume that the handle itself was repaired. This man testified positively that there was no repair to the handle. He went in there and stopped the leak.

By Mr. Lynch:

Q. (continued) Assume, as a correction, that the handle was not repaired, but that the leak was repaired, something was done with the spigot itself or the mechanism of the spigot, so that the leak itself was stopped.

Mr. Arth: I still object to the question.

The Court: He has a right to ask the question. We can assume the fact that he put in a washer. He is a registered, experienced plumber. He knows the situation in bathrooms.

170 By Mr. Lynch:

Q. (continued) Assume further that a washer was put in there.

The Court: Now, what is your objection?

Mr. Arth: I object to the question on the ground that the answer would certainly be nothing in the world but speculation.

Mr. Lynch: It is an opinion.

Mr. Arth: The answer would assume that this handle was damaged or something of that character. There is no evidence here that it was.

The Court: I don't know what he will say. If you want to add that also, that the handle was cracked at the time, and let him assume that—

Mr. Lynch: Yes, your Honor.

Mr. Arth: He didn't say it was cracked at the time.

The Court: The witness has testified that it was. The plaintiff's witness and himself, he and his wife, testified that there was a crack in that handle, and that it had been there for two weeks.

Mr. Arth: Even if there had been—

The Court: And they had seen it.

Mr. Arth: I don't concede that. But, even if there had been, your Honor—

Mr. Lynch: You don't have to concede anything, Mr. Arth. It is not a case of your concessions. It is a case of a hypothetical question.

171 The Court: He started to put in another amendment when he was interrupted that I have suggested to the hypothetical question.

By Mr. Lynch:

Q. (continued) The amendment, Mr. Colbert, would be that through the word "hot," which appears on that porcelain part of the handle, there was apparent—there was a crack which was visible.

Mr. Lynch: That is what the witness said, if your Honor please.

The Court: All right.

Mr. Lynch: Now, will you answer the question?

Mr. Arth: I object to the question on the same ground, that it still is speculative and nothing in the world but a conjecture and that is all.

By the Court:

Q. Have you an opinion on that state of facts that they asked you to assume? A. Yes, your Honor.

Q. You really have an opinion? A. Yes.

Q. All right. What is it? A. I would say that the spigot was repaired in a defective manner, because the spigot should have opened, even though the handle did break; otherwise it should open easily at the time.

172

By Mr. Lynch:

Q. Mr. Colbert, when a spigot is leaking—

Mr. Arth: Your Honor, my exception is in to that question?

The Court: You have an exception under those new rules. I want to make sure that you do have.

Mr. Lynch: He has. You don't have to take an exception any more, do you?

Mr. Arth: No, you don't. But my objection is there. That is what I wanted to be sure of.

The Court: If you are satisfied that there is an objection to be made, all right. If you want to add to it, you may do so, if you have anything further to say.

Mr. Arth: On the ground that the question is not predicated upon anything that requires expert testimony. This man is here as an expert, I take it. I don't know why else he would be here.

Mr. Lynch: That is right. He is here as an expert.

Mr. Arth: Any layman can say what he says.

The Court: I will consider it.

Mr. Lynch: Do you concede that a layman would come to the same conclusion that this witness did?

The Court: I will say this to you gentlemen: I will consider the matter. If I decide that it is not proper, I
173 will strike it out.

By Mr. Lynch:

Q. Now, Mr. Colbert, in what way do you repair a spigot that is leaking? A. The way is to put a new washer on it; or else, if the seat is worn, you grind the seat, reseal it.

Q. If the seat is worn too much— A. If the seat is worn too much, we replace it, put on a new faucet.

Q. Put on an entirely new faucet? A. Put on an entirely new faucet.

By the Court:

Q. Apparently this didn't need a new faucet if the leak was stopped, did it? A. It might have, your Honor, because—

Q. I know, but the leak was stopped.

By Mr. Lynch:

Q. Explain to his Honor why you say that it might have needed a new faucet and still be stopped. A. Because you can stop a leak, your Honor, by using a very hard washer and screwing it down very tightly, so that it could be tight for a few days or possibly a few weeks, and then begin to leak again.

Q. What is the effect of doing that, Mr. Colbert? What is the effect of that on the handle of the spigot? A. It makes the handle hard to turn.

Mr. Lynch: That is all. You may inquire.

Cross Examination

By Mr. Arth:

Q. Mr. Colbert, do you know what kind of washer was used in that spigot? A. I do not.

Q. You don't know anything about that? A. No, sir. I do not.

Q. You have seen many porcelain fixtures, haven't you, Mr. Colbert? A. Yes.

Q. Does a hot water spigot handle stand up that way (indicating) or does it stand that way (indicating)? A. As a rule it is more or less horizontal. Of course, it can be in any position.

Q. It goes down this way? A. Like that (indicating).

Q. When you turn it on? A. No. Not when you turn it on. It would go the other way. It opens to the left and closes to the right.

Q. The fixture is here. The cold water is to the right when you face the fixture? Isn't that correct? A. That is right.

Q. And you hot is to the left? A. Yes.

175 Q. When you turn on the hot, you turn it to the left? A. That is right.

Q. Isn't that just what I said a moment ago? A. I thought you said you turn it to the right.

Q. No, sir. I did not.

Have you seen the fixture in question here, Mr. Colbert?

A. I have seen the handle before.

Q. This handle (showing the witness Plaintiff's Exhibit 2)? A. Yes.

Q. That is all you have seen? A. That is all I have seen.

Mr. Arth: No further questions.

Mr. Lynch: That is all. You may be excused.

(Witness excused.)

* * * * *

Deposition of Dr. Daniel L. Borden

(Mr. Lynch thereupon read to the jury the deposition of Dr. Daniel L. Borden,).

* * * * *

361 Q. Doctor, did you have occasion to see and treat Mr. John E. Varner, in the month of October, 1939?

A. I did.

Q. For an injury to the hand? A. I did.

Q. Will you please state when you first saw him and what the condition of his hand was and what you did, please?

A. I saw Mr. John Varner at the request of Doctor Richard Castell on October 25, 1939.

Mr. Varner stated that he had injured his hand on October 22.

I found that the ring finger had been cut at its base and that he had lost the power to flex the finger.

There is some evidence of infection present in the wound and it was dressed and watched until the infection cleared up.

362 On November 3, 1939, he was admitted to the George Washington Hospital and the wound was enlarged and the two tendons were found to be cut, the long tendon and the short tendon which control the flexion of the ring finger of the right hand.

Those tendons were brought together and sutured.

* * * * *

On December 8 of the same year he was readmitted to the hospital and the tendons were re-sutured, they having failed to hold following the first operation.

On February 13, 1940, Mr. Varner was admitted to the hospital for the third time, at which time the ring finger

was amputated just proximal to the second joint, leaving a stump three-quarters of an inch in length. The reason for this amputation was caused by the inability of Mr. Varner to straighten out his ring finger. The flexed finger in a flexed position interfered with his occupation as a carpenter.

Mr. Varner was last seen by me on March 6, 1940, until he appeared at this office one week ago.

On October 28, 1941, I examined Mr. Varner again and found the amputated finger well healed. The stump of the finger still is slightly flexed toward the palm.

Q. And will that condition remain the same, being slightly flexed toward the palm, or will it straighten out of its own accord? A. This condition in my opinion will remain approximately as it is now unless further surgery is considered.

363 Q. And what further surgery could be done to flex the finger out straight or to help the finger in any way? A. The old fibrous adhesions could be cut, which might allow the finger to straighten out more than it is at the present time.

Q. Is there any alternative, Doctor? A. That failing, the remaining stump could be amputated.

Q. What about the place in the hand itself where the tendons were sewed together? Has that healed now, Doctor? A. The old scar in the palm of the hand has entirely healed, but there remains behind a dense scar attaching itself to the base of the ring finger.

Q. Will there be any disability in relation to the scar and the attachment that you have just described? A. I think the only disability that I could think of would be the fact that the ring finger, being somewhat flexed, might act as an object being in the way of any effort that he might make to hold a tool in his occupation.

Q. Doctor, during the time you were seeing him from the 25th of October, 1939, up until March 6, 1940, were you seeing him at fairly regular intervals during that period

of time? A. He was getting physiotherapy in this office and dressings, approximately thirty-five times, and then the thirty-sixth time was the time I examined him last week.

Q. Doctor, would you say that he was disabled from the time you saw him on October 25 up until March 6, 1940? A. Well, that is my impression; he was off duty that length of time.

* * * * *

364 Q. Doctor, is there difficulty in having tendons remain together after they are once sewed in the hand? A. Tendons that are sewed immediately after an injury have a better chance to hold than with a secondary operation, or when a secondary operation is done.

When we have an infection, as we have here, the probabilities of a good result are materially lessened.

Q. Is the injury that he had one which is accompanied by pain? A. Oh, yes.

Q. Would you say considerable pain, Doctor? A. I think he has considerable pain. He went through three operations.

Q. And from one operation to another his hand was in bandage, was it? A. Oh, yes.

Q. Doctor, what is the amount of your bill for professional services rendered, please? A. \$147. The bill has not been paid.

Mr. Lynch: You may cross-examine.

365 Cross-Examination

By Mr. Arth:

* * * * *

366 You are not contemplating any further operation on his hand, are you, Doctor? A. This man when I saw him a week ago told me that the stump of this ring finger was still bothering him, being in the way, and I told him if it was bothering him sufficiently to disrupt his work in any way we perhaps could improve the position of that stump.

Q. By a slight operation? A. By cutting the adhesion that is holding it in toward the palm of the hand.

Q. That is the little finger you spoke of? A. The ring finger.

Q. Can he flex the ring finger? A. He can flex it, making a fist. It is already flexed in the palm, about fifteen per cent of normal.

In other words, when he holds the hand out straight, the stump sticks up in the palm.

* * * * *

176 Mr. Lynch: The plaintiff rests.

(The following proceedings were had at the bench, out of hearing of the jury:)

Mr. Arth: Would you read to the Court the hypothetical question that Mr. Lynch asked of Mr. Colbert?

(The reporter read as follows:)

“Q. I will show you a spigot, Mr. Colbert, the same one that has been offered in evidence here. Assume, Mr. Colbert, these facts as correct and true; that this spigot, this handle which I hold in my hands in two pieces put together was on a hot water spigot faucet, in a bath tub; and that the spigots were leaking, and that there was a drip in the
177 tub; and a janitor of the apartment building in which this spigot was located came to the building to repair it or fix it, and that he did something with the spigot—what was done is not known at this moment—but he did something with the spigot, so that, when he finished with the spigot, the drip had disappeared.

“Assume further that the next day, when the spigot was attempted to be used, the following morning, that when it was turned or attempted to be turned, the person using ordinary pressure of their hands, as they would to turn a spigot, that the porcelain broke, and the spigot or the handle of the spigot did not move; remained stationery.

“I will ask you whether or not under those circumstances you would say that the spigot had been repaired in a proper and careful manner or whether it had been repaired in a negligent manner.”

The Court: That is the vice of the question as you have it now. Wouldn't it have been better to put it in the proper way?

Mr. Lynch: It wouldn't make any difference.

The Court: I think it would.

Mr. Lynch: Let us get the amendments and his answer, and I think you will see that it is all right.

Mr. Arth: He didn't do anything to the handle. All he did was put a washer on. That is all. There is no evidence as to what kind of washer or anything about it.

The Court: Go ahead.

178 Mr. Lynch: Let us get the amendments.

(The reporter read as follows:)

“Q. (continued) Assume, as a correction, that the handle was not repaired, but that the leak was repaired, something was done with the spigot itself or the mechanism of the spigot, so that the leak itself was stopped.

“Assume further that a washer was put in there.

“The amendment, Mr. Colbert, would be that through the word ‘hot’, which appears on that porcelain part of the handle, there was apparent—there was a crack which was visible.

“A. I say that the spigot was repaired in a defective manner, because the spigot should have opened, even though the handle did break; otherwise it should open easily at the time.”

Mr. Lynch: He said it was repaired in a defective manner.

The Court: I think he should have told you the proper manner.

Mr. Lynch: Let us go ahead. He said some more. Let us get the rest of his testimony, Mr. Reporter.

The Court: I would like to bring him back.

Mr. Lynch: I will bring him back.

(The reporter read as follows:)

179 “Now, Mr. Colbert, in what way do you repair a
spigot that is leaking? A. The way is to put a new
washer on it; or else, if the seat is worn, you grind
the seat, reseal it.”

The Court: We are not dealing with *res ipse loquitur*.
I don't believe that you can prove that by a hypothetical
question—

Mr. Lynch: I think that you can.

The Court: —unless you prove the proper way to do it.

Mr. Lynch: You don't think I am going to put their wit-
ness on the stand and ask him a hypothetical question?

The Court: No. But it is a big help to the jury. You
cannot invade the province of the jury. That is elemental.

Mr. Lynch: Certainly. And when you are getting a jury
to decide on the sanity of a man, you get experts and you
get lay people and then you ask them the question. You
have the same question in many other cases. How are you
going to get in any case, when anything is repaired, whether
it has been done properly or not, whether you have an ex-
pert—

The Court: By proving by the expert the proper way,
step by step. That is what should have been done, instead
of having him say that it was repaired in a negligent
manner.

Mr. Lynch: Let us read the rest of his answer.

The Court: I think we have cleared it up. I was not sure,
and I wanted to make sure of it.

Mr. Lynch: Read the rest of his answer, Mr. Reporter.

(The reporter read as follows:)

180 “Q. If the seat is worn too much— A. If the seat
is worn too much, we replace it, put on a new faucet.

“Q. Put on an entirely new faucet? A. Put on an en-
tirely new faucet.

“By the Court:

“Q. Apparently this didn’t need a new faucet if the leak was stopped, did it? A. It might have, your Honor, because—

“Q. I know, but the leak was stopped.

“By Mr. Lynch:

“Q. Explain to his Honor why you say that it might have needed a new faucet and still be stopped. A. Because you can stop a leak, your Honor, by using a very hard washer and screwing it down very tightly, so that it could be tight for a few days or possibly a few weeks, and then begin to leak again.

“Q. What is the effect of doing that, Mr. Colbert? What is the effect of that on the handle of the spigot? A. It makes the handle hard to turn.”

Mr. Lynch: How in the world could it be possible to prove in any other way that the spigot was negligently repaired except to tell him what the man did do?

The Court: To tell him what was done, to give him the facts, and then show by an expert the proper way to
181 do it, the tension to be applied in tightening it, and all of that. That would be fine. I worried about that.

Mr. Lynch: Judge, you are not going to be reversed on this. Here is the point: The point is, I submit, your Honor, that there is absolutely no way that any person can show in a case where a party is injured as a result of defective equipment that has been repaired, where it had been repaired, and he says that if it had been repaired properly, the spigot would move. This spigot didn’t move for ordinary pressure. It broke. I think that is the fact of it.

The Court: You are talking about rust in the water.

Mr. Lynch: I am not, sir.

The Court: You think that over. Talk to your man about it. I am perfectly willing—

Mr. Lynch: Judge, I would like to get a ruling on it.

The Court: I am willing to go along with you. I just wanted to review that for my own satisfaction. Perhaps the latter part of it has cleared it up. But we are still in the dark about how the work should properly be done. I will tell them, if I have to, that the expert has not told them whether the man was guilty of negligence or not; that they should consider his evidence and determine under those circumstances whether it is proper repair. Let us know what the facts are.

Mr. Lynch: Of course, I don't think that your Honor ought to go to the extent of saying just what you
182 have said, to the jury. I think the jury would be entitled to take the opinion of the expert in the case.

The Court: On the proper way to do a thing, but not to say that the man was negligent.

Mr. Lynch: That is the ultimate question, that if that result occurred, it was improperly repaired.

The Court: That is something I will think over a little bit.

* * * * *

183 *Motion for Directed Verdict*

Mr. Arth: I move your Honor to direct a verdict for the defendant on the ground that the plaintiff has wholly failed to prove any negligence on the part of this defendant.

(Discussion on motion not transcribed.)

The Court: I will think over your motion. You bring your witnesses in. If I decide otherwise, I will let you know.

(Whereupon, at 3:55 o'clock p.m., an adjournment was taken until the next day, Thursday, December 18, 1941, at 10 o'clock a.m.)

* * * * *

Thursday, December 18, 1941.

Hearing of the above-entitled case was resumed before Mr. Justice Oscar R. Luhring and a jury at 10 o'clock a.m.

* * * * *

(The following proceedings were had at the bench, out of hearing of the jury:)

The Court: This is not a very cleancut and open question. I have decided to let it go to the jury. On paragraph 4 (a) or whatever it is of this complaint, that part of the complaint which recites that he undertook to repair
185 it and negligently repaired it.

I will tell you also that I think that contributory negligence is in this case.

Mr. Lynch: Of course, that is over my objection, if that is what you are going to instruct the jury.

The Court: I think it is in the case.

Mr. Arth: I would like very much to be heard further on this matter. It is a tremendous disappointment to me. I cannot see how under any conditions your Honor can find—

The Court: Here was a janitor undertaking to make a repair. By some process he tightened this handle.

Mr. Arth: We don't know whether he did or not. There is no proof of that.

The Court: He said it would be hard to work.

I am going to let it go to the jury for this reason also: I am not foreclosing you at all from renewing this motion. You are not foreclosed, you know. These new rules provide for that. So, as far as I am advised at the present time, I think I should let it go on that angle.

Now, as to this charge here, I believe that in paragraph 4 of the complaint the plaintiff states that while in the act of using the water spigot said spigot broke from a defective condition, which defective condition was that this handle was negligently repaired. I don't believe we could go to the jury on that angle of it.

186 Mr. Lynch: Let us reserve that, your Honor, until it gets to the jury, because I—

The Court: I am pointing out the thing that prompted me, and that is this allegation of your paragraph 4 (a).

Mr. Arth: Just a moment, your Honor. I want to renew my motion that all the testimony of this Mr. Colbert be stricken from the record on the ground that the question propounded to him was not based upon the facts in the case, even if it were admissible. And furthermore, if nothing else, by your Honor's ruling, that some witness coming here and telling this jury that some act is negligent or some condition is negligent, when he does not know one thing about it, that that is something entirely within the province of this jury.

The Court: I think your objection to the question is the weight to be given to the testimony. If the jury find that some of the assumed facts are not true, that is bound to militate against their opinion to the extent that those facts are not true. I think that is the proposition.

I have just read over the hypothetical question. I overrule that motion.

Mr. Arth: Very well.

(Whereupon proceedings at the bench were concluded.)

* * * * *

187 Mr. Arth: Your Honor, this is a photograph that it is agreed is a correct portrayal of the bathroom. It was taken just a few days ago. The physical layout of the bathroom is the same now as it was then, with the exception that since this accident there has been a new fixture put in the bath tub, a new water fixture.

Mark that, please.

The Court: It will be admitted.

(The photograph referred to was received in evidence and marked Defendant's Exhibit 1.)

(Mr. Arth handed Defendant's Exhibit 1 to the jury. The jury passed it around among themselves.)

Whereupon **Albert Branham** was produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Arth:

Q. Albert, how old are you, approximately? A. 35.

Q. What is your occupation? A. Janitor.

Q. How long have you lived in Washington? A.
188 About twenty-two years.

Q. Where are you now employed? A. 133 Webster.

Q. Is there another building there? A. 131.

Q. Are you the janitor of both those buildings? A. Yes, sir.

Q. In which one do you live? A. I live in 133.

* * * * *

Q. How long have you been employed as janitor at that apartment? A. Over six years.

189 Q. Where were you employed before that? A. At the Catholic Daughters at Sixth and E.

* * * * *

Q. How long were you employed there? A. I was employed there about sixteen years.

Q. Have you done any other janitor work? A. No, sir. Not here in the city.

Q. In connection with your duties at 133 Webster Street, will you tell the jury, the Court and the jury, how many hours a day you spend at that apartment in connection with your work? A. Well, I am there from 6 o'clock in the morning until about half past 10 or 11 at night.

Q. What do you do at night? A. Tend the fires.

Q. I wish you would state your other duties. What do you do in the daytime? A. Oh, clean the halls, and I put a washer on a spigot if they need it, or other cleaning and like that.

* * * * *

Q. Do you remove trash and so on? A. Yes, sir.

Q. Do you recall Mr. Varner, who occupied an apartment in 133 Webster Street? A. Yes, sir.

190 Q. Did you have occasion to change a washer in the bath tub fixture— A. Yes, sir.

Q. —during the week of, a few days prior to October 22, 1939? A. Yes, sir.

Q. Who made a complaint to you about the faucet? A. Why, Mrs. Varner.

* * * * *
Q. Where were you at the time it was made? A. I was in the hall, cleaning the hall.

Q. What time of the day was it? A. Well, I judge it was in the morning, because I used to clean in the mornings.

Q. Was it in the middle of the week or early in the week or when? A. No. It was on a Thursday.

Q. On a Thursday?

* * * * *
Q. The Thursday prior to the Sunday when Mr. Varner was injured? A. Yes, sir.

* * * * *
Q. What did she say to you? A. She told me to—
191 asked me would I fix the washer in the bath tub, fix the spigot in the bath tub.

Q. What did you do? A. I went to Mrs. Gregory and told her that Mrs. Varner wanted a washer on the bath tub, and she didn't have any—

Q. Wait a minute. Did Mrs. Gregory do anything? A. Mrs. Gregory?

Q. Yes. A. Yes, sir.

Q. What did she do? A. She said—she told me to let the washer go until she would see the plumber—

Q. Was the plumber working there? A. The plumber was working in the basement.

Q. Wasn't there a plumber working in apartment No. 2? A. Yes. Plumber working in apartment No. 2.

Q. You didn't say anything to him about it? A. No. I didn't say anything to him.

Q. Did she go to Apartment No. 2, do you know? A. I don't know whether she did or not.

Q. Did you do anything the next morning? A. Yes, sir.

Q. Did you say anything to Mrs. Gregory? A. Yes, sir.

Q. Or did she say anything to you? A. She told
192 me to go to the plumber that was in the basement—

Q. That would be Friday? A. Yes, sir.

Q. The 20th? A. She told me to go the plumber and get a washer.

Q. And was the plumber there? A. The plumber was in the basement. Yes, sir.

Q. What was he doing in the basement? A. Doing something to the boilers. I don't know what.

Q. A heating man? A. Yes.

Q. Did you get a washer from him? A. Yes, sir.

* * * * *

Q. Did you have any washers yourself? A. No, sir. I didn't have any.

Q. Were you out of them or what was the point? A. I had run out of washers and she said she was out of washers and to get one from the plumber.

193 Q. Now, that was Friday morning? A. Yes, sir.

Q. What did you do? A. I went to the plumber and got the washer and put it on.

Q. You went to Mrs. Varner's apartment? A. Yes, sir.

Q. Do you recall what you did there?

By the Court:

Q. When did you go to Mrs. Varner's apartment and put it on? A. Friday morning.

By Mr. Arth:

Q. What did you do there? A. I put on the washer, and that was all I had to do up there.

Q. On which handle did you—on which valve did you put the washer? A. Cold water valve.

Q. Cold water? A. Yes.

Q. How did you determine that it was the cold water valve that was leaking? A. Put my hand under it to see whether it was cold or hot water dripping, and then cut the cold water off.

Q. Where do you cut it off? A. Under the toilet
194 seat.

Q. Does that cut off the cold water to the bath tub?
A. Yes, sir.

Q. When you finished replacing the washer on the cold water spigot, what was the condition of the fixture? A. Oh, it was all right; only it was dripping just a little.

Q. Just a little? A. Yes, sir.

By the Court:

Q. After you fixed it, you mean? A. Yes, sir.

By Mr. Arth:

Q. Did you say anything to Mrs. Varner about that? A. Yes, sir. I told Mrs. Varner that it would take up in a day or so; and if it didn't, to let me know.

Q. Did she say anything further? A. No, sir. She didn't say anything.

Q. Did you do anything to the handle or to the hot water fixture there, hot water spigot? A. No, sir. There wasn't anything the matter with that.

Q. There wasn't anything the matter with that, you say?
A. No, sir.

Q. When you left there what was the condition of the handles? A. They was all right.

195 Q. Both of them? A. Yes, sir.

Q. Did the handles work all right when you moved them up and down? A. Yes, sir.

Q. Did you do anything further in that apartment that week? A. No, sir.

Q. Did you go in there for any purpose whatever on Saturday? A. No, sir.

Q. Were you there between 5 and 6 o'clock on Saturday evening? A. No, sir.

Q. Do you do any work of that kind on Saturday? A. No, sir, unless it is an emergency case.

Q. Do you ever do anything in the way of plumbing work there except changing washers? A. No, sir.

Q. When a fixture needs a little—Do you know what a plunger is? A. A plunger? Oh, yes.

Q. Do you know how to use a plunger? A. Yes.

196 Q. Do you ever use a plunger? A. Sometimes I have occasion to use a plunger. If you can't open it with a plunger, then a plumber has to come.

* * * * *

Q. Was there any complaint made to you at any time regarding the handles of the fixture in the bath room of the Varner apartment? A. No, sir.

Q. Did you ever work for Mr. Varner? A. No, sir.

197 Q. Do you know Mr. Goldstein, who was— A. Yes, sir.

Q. Did you ever do any work for him? A. I have done a little cleaning up for him at his store.

Q. When? A. Well, when he first opened.

Q. When he first opened? A. Yes, sir.

Q. After the store was completed? A. Yes, sir.

By the Court:

Q. How did you happen to do that? A. Why, he asked me to come and clean up.

Q. He personally? A. Yes.

By Mr. Arth:

Q. Was Mr. Goldstein a tenant of one of your apartments? A. Yes, sir.

Q. Which one? A. 131.

Q. Now, when you left on that Friday after putting in that washer, what was the position of the handles on the bathroom fixture, water fixture? A. They sat like that (indicating).

* * * * *

198 By the Court:

Q. Can you take the blackboard and draw a picture of those handles the way you saw them? Where is that handle that he has got in evidence here? Let us look at that. Do you have that handle there?

(The witness went to the blackboard and drew two lines with chalk about as follows:)

* * * * *

200 Mr. Arth: The position, for the record—

The Court: This handle was not in a vertical position, was it?

Mr. Arth: Not in a vertical position.

The Court: Was it in a horizontal position?

By Mr. Arth:

Q. Was it in a horizontal position (indicating), or below a horizontal position (indicating)? Was it like you have got in on the board? A. Yes.

Mr. Arth: Then it is below the horizontal.

Mr. Lynch: I object. "Below the horizontal position." Just a minute.

The Court: Oh, bosh. Let us not contend about a little thing like that.

Mr. Lynch: I submit, if your Honor please—

The Court: I overrule the objection. Sit down, please. You can cross-examine and bring it out better.

Mr. Lynch: Would your Honor permit me to make a statement for the record? The only thing I am objecting to is this: This witness has not described it—he has described it, and Mr. Arth has put words on the record as to what his description shows; and I submit, your Honor, that they are not accurate. That is the reason why I am

201 objecting to it.

The Court: If that is a correct illustration, certainly it is below a horizontal position. You will agree to that?

Mr. Lynch: I won't agree to that.

The Court: The horizontal is straight across.

Mr. Lynch: Because it depends—

The Court: It is down this way at an angle. The jury can see. It is just a matter of common sense. So let us not try to confuse things like that. I don't accuse you of doing it. Maybe I am confusing it more than you are. Go ahead, Mr. Arth.

By Mr. Arth:

Q. Had you ever fixed any, renewed any washers in the Varner apartment before? A. Yes, sir.

Q. Did you personally know whether Mr. Varner had an accident in his bathroom on Sunday? Did you personally know anything about it? A. I saw it Sunday—I seen him come out and go to the hospital on Sunday.

Q. Did you say anything to him? A. No, sir. I didn't say anything to him.

Q. Did he say anything to you? A. No, sir.

Mr. Arth: You may inquire. Oh, pardon me.

202 Q. You are still employed there at the apartment?

A. Yes, sir.

Cross Examination

By Mr. Lynch:

Q. What is your salary a month? A. \$35 a month.

Q. You are not a registered plumber, are you? A. No, sir.

* * * * *

Q. When before had you renewed washers in the Varner bathroom spigots? A. Different times, but I couldn't tell you the exact time.

Q. Had you renewed any in there during the year 1939, before this time that you have just told us about? A. Oh, yes, sir. I renewed it in the basin; put on the spigot-washer.

Q. And when was that? A. It was sometime about a couple of weeks or so before that.

Q. A couple of weeks before this time in October? A. Yes, sir.

Q. And when before that time had you renewed
203 other washers in the apartment? A. Well, different times; but I couldn't tell you exactly when.

Q. You had renewed them on the bath tub before, hadn't you? A. Oh, yes.

Q. More than once before? A. Oh, yes.

Q. Could you tell us about how many times during the period that Mr. Varner was living in the apartment that you had renewed the washers on the bath tub spigots? A. Well, I couldn't tell you exactly, because there were so many of them. I couldn't tell you exactly how many times. Sometimes I put on two washers a week and sometimes only—had't put on any in a week. Then again it is more.

Mr. Arth: I think he is talking about the whole apartment.

Mr. Lynch: I think he is.

By Mr. Lynch:

Q. I am only talking— A. Just in the one?

Q. Just in Mr. Varner's apartment. Just how many times did you put washers in—I am limiting it, Albert, to the bath tub in Mr. Varner's apartment— A. Oh.

Q. How many times did you put washers on the
204 bath tub spigot in Mr. Varner's apartment, while

Mr. Varner was living there, before the accident? A. Oh, I understand it now; but I don't know exactly how many times. But whenever there was a spigot leaking we always put on a washer.

Q. That was several times, though, wasn't it? A. Yes, sir.

Q. And Mrs. Gregory would tell you to do it, wouldn't she? A. No. Mrs. Gregory wouldn't tell me all the time, because whenever the owners, the tenants, would tell me that the tube was leaking or the basin or anything, I would take a washer and put it on.

Q. Did Mrs. Gregory ever tell you to do it, Albert? A. Oh, yes.

Q. And sometimes you would do it yourself and sometimes she would tell you to do it? A. Yes, sir.

* * * * *

208 By the Court:

Q. Here is a picture of that bathroom, isn't it? Isn't that a picture of that bathroom? A. Yes, sir.

Q. Where is that fixture? Where do you turn it on? A. Here (indicating).

Q. Those are wheels. A. Yes.

Q. They have been changed since this accident? A. Yes, sir.

Q. Can you by looking at that tell Mr. Lynch and this jury just what position that handle was in when the water was off? Now, tell him, and let us see if we can get it that way. A. Here is one handle down like that (indicating) and the other one down this way (indicating).

Mr. Lynch: He points down a great deal like this
209 hose is pointing (indicating)?

The witness. Not down that far. No.

* * * * *

Q. Show me.

(The witness drew a diagram on a piece of paper.)

Q. That is where the water comes out? A. If you turned that up. See?

Q. Yet us strike this out (erasing something on the paper). A. The spigot sits out like that (indicating) on each side.

(At this point the Judge's bailiff handed a spigot to the Judge.)

The Court: Let us illustrate with this, if you don't mind. Here is a handle. I got this out of my tool box.

Mr. Lynch: No wonder it is so rusty. It probably has not been used for 25 years.

The Witness: The way that spigot was—This is a different one altogether.

210 By the Court:

Q. All I want to know is how that handle was standing when the water was off, when it was turned off in that bath tub. That is all we want to know. A. Standing up like that (indicating).

Q. How do you turn it on? A. Like that (indicating).

Q. To the left is off? A. Yes, sir.

Q. You don't put it down? A. No, sir.

Mr. Arth: Are you talking about the cold or the hot?

Mr. Lynch: They both work the same, the cold and hot water spigots. Both were the same.

The Witness: Both were the same.

By Mr. Lynch:

Q. When the water was off, it was almost level, straight out? A. No.

Q. Down a little? A. Like that (indicating).

Q. Like you have got it in this picture? A. Yes.

Mr. Lynch: I offer that in evidence.

Mr. Arth: Your Honor, I object to the fixture too.

211 It is not the identical one that was in that apartment.

Mr. Lynch: I will withdraw this (crumpling up paper on which the witness had drawn.)

Mr. Arth: I will be very glad to let you use one, if you haven't any objection to it, that came out of Mrs. Gregory's apartment just the other day.

The Court: With porcelain handles?

Mr. Arth: And everything, yes. It does not have the handles, but I can put them on it. I would be glad to bring that down here if you haven't any objection to the use of it.

Mr. Lynch: I don't—

Mr. Arth: It is an identical fixture.

The Court: All I want when we are talking about these things is to get before this jury the manner in which that handle had to be operated; whether it operated up or pushed down, moved horizontally or what not.

This little fixture that I have—I don't know where my bailiff got it. It must have come out of my office. I used it

because it did have that type of handle which lifts up to open.

* * * * *

By Mr. Lynch:

Q. So, Albert, when a person wished to run the
212 water in the bath tub, they would lean over and take
hold of the handle and pull the handle up, wouldn't
they? A. Oh, yes. Have to raise it up.

Q. Raise it up, and that would let the water come in? A.
Come in.

Q. Then when you wanted to close it, they would push it
down? A. Yes, sir.

* * * * *

Q. Did you ever talk to Mr. Varner about doing some
sweeping up at Mr. Goldstein's store when he was working
on it? A. Do some talking to him?

Q. Yes. Did you ever talk to him about—did Mr. Varner
ever talk to you about coming up there and doing some
sweeping in the store when he was working on the store for
Mr. Goldstein? A. Not as I know of.

* * * * *

213 Q. You remember when Mr. Varner was hurt,
don't you, Albert? A. Yes, sir.

Q. Do you remember also that at that time Mr. Goldstein
was building a store up on Upshur Street? A. Yes, sir.

Q. Don't you recall that Mr. Varner talked with you and
asked you if you wouldn't come around and help him to do
some sweeping on the floors around there for him? A. No.
Mr. Goldstein got me to come up there.

Q. Was it just before Mr. Varner was hurt or just after
Mr. Varner was hurt? A. I don't remember now whether
it was before or after.

Q. You don't remember whether it was before or after?

* * * * *

Q. Don't you recall also that Mr. Varner had asked you something about coming up there and giving him some help sweeping the floors there? A. No. I don't remember Mr. Varner asking me anything about it.

Q. You don't remember Mr. Varner ever asking you to go up there? A. No, sir.

Q. You do remember Mr. Goldstein? A. Oh, Yes.
214 He hired me to go up there and clean.

Q. How many apartments are there in 133 Webster Street? A. Twelve.

Q. And how many apartments are there in 131? A. Twelve.

Q. Is it a three-story building? A. No, sir.

Q. Two stories? A. Two stories on the basement.

* * * * *
215 Which floor of the building were you on, Albert, when Mrs. Varner spoke to you? A. I was up on the top floor.

Q. Is that the same floor that she lived on? A. Yes, sir.

Q. In the same building that she lived in? A. Yes, sir.

Q. Did she come out in the hall or did you go to her apartment? A. She came to the door.

Q. The plumber was at that time working down in the basement of that same building, wasn't he? A. No, sir. The next day he was down in the basement.

* * * * *
Q. And you told Mrs. Gregory that Mrs. Varner wanted the bathroom spigots fixed, didn't you? A. Yes, sir.

Q. And you told her that you didn't have any
216 washers? A. Yes, sir.

Q. And didn't she tell you that same day to get them from the plumber? A. Well, that was Friday.

Q. The next day? A. Yes.

* * * * *
Q. Now, after getting the washer from the plumber, did you tell the plumber what you wanted the washer for? A.

I told him I wanted to fix a spigot, and he gave me the washer, and I went up and put the washer on the spigot.

Q. How many plumbing men were down in the basement working? One or two? A. Two.

Q. Do you know their names? A. No, sir. I do not.

Q. You don't know their names? A. No, sir.

* * * * *

217 What time Thursday morning was it that Mrs. Varner spoke to you about it, Albert? A. When I was up cleaning the hall.

Q. I know, but what time in the morning was it? 9 o'clock? A. It was about half past 9, I guess.

Q. 9:30 on Thursday morning? A. Yes, sir.

* * * * *

219 By the Court:

Q. Albert, tell me and the jury how you go about putting a washer in one of those things. Talk to the jury and speak up so that we can hear you. What is the first thing you do? A. The first thing I do is to take my screw driver and take off that little handle.

* * * * *

220 Q. Is that the handle that you have seen here? A. That is one of the handles. I don't know that that is the one or not.

The Court: They say it is. I don't know.

Mr. Arth: They don't say it is, your Honor. The witness didn't say that that was the handle that he took off.

Mr. Lynch: Oh, no. The Court didn't say that either. The Court said that this is a handle that was on the spigot, on the same type of spigot.

By the Court:

Q. Is that the kind of handle that was on there

(Mr. Lynch handed the witness Plaintiff's Exhibit 2.)

A. No, sir. That handle—I don't think that was on there.

Mr. Lynch: He said: "No, sir. That handle was not on there."

Mr. Arth: May I say this to your Honor: He said he fixed the cold water spigot. He did nothing at all except on that cold water spigot.

The Court: That is true.

Mr. Arth: He has looked at that and he says that that is not the handle.

221 By the Court:

Q. Is the cold water handle the same type as that? A. Yes.

Q. It looks like that? A. Yes.

By Mr. Lynch:

Q. May I ask this: Was it a spigot like that except that it said "cold" on it? A. It looks almost like that.

Q. It looks almost like that? Would you say it was the same kind of handle as this? A. The cold water spigot? The one that I fixed?

Q. Yes. A. Yes, sir.

Q. Was just like this except that it said "cold" instead of "hot" A. Yes.

Q. And the first thing that you would do would be to loosen a screw which would hold this handle on? A. Yes.

Q. That handle becomes very loose then, doesn't it? A. Yes.

Q. Then the next thing you do is to unloosen this nut—

* * * * *

222 Q. This screw unscrews first right here (indicating)? A. Yes.

Q. This handle would then become very loose?

Mr. Arth: Wouldn't it be better to let the witness testify to what he did?

Mr. Lynch: Wait a minute, Mr. Arth. Just a minute.

The Court: Find out how he did it.

By Mr. Lynch:

Q. This handle then comes off, you say? A. Oh, yes.

Q. Then you get a wrench and unscrew this, don't you, this nut? A. Yes, sir. Not that kind of nut.

Q. Not that kind of nut, but a nut that takes the same place on that spigot? A. But it takes the same place.

Q. Then you get into the spigot itself, where you can see where the trouble is? A. Yes.

223 Q. Isn't that right? A. Yes.

Q. This piece on the end here is the washer, isn't it (indicating on the spigot that the bailiff had produced)? A. Yes, sir.

Q. That is the washer on there? A. Yes.

Q. That is hard rubber, isn't it? A. Yes.

* * * * *

Q. Go ahead. A. (indicating) comes off, and there
224 is a washer on the end of that spigot.

By the Court:

Q. Is that the washer that you replaced? A. No, sir. This one?

Q. Take it out and let us see if we can find it. A. You have to have a wrench to unscrew that.

The Court: I haven't got that.

The Reporter: I have a pair of pliers here.

Mr. Lynch: Let me have them.

(Mr. Lynch took a pair of pliers and removed the top of the spigot. The witness started to unscrew the handle with his fingers.)

Mr. Lynch: I will ask him a few more questions and then I think I will be practically through with him.

(At this point the bailiff brought in a screw driver. Mr. Lynch took the screw driver and removed the handle of the spigot.)

By Mr. Arth:

Q. Albert, do you know anything about fixing that sort of thing? A. No, sir. It was not a fixture of that kind.

By Mr. Lynch:

Q. Was there a washer inside there (indicating)? A. Yes.

Q. Is that the washer that you replaced? A. Not
225 inside of that, no, sir. The washer that goes around here (indicating). Here is the way this turns (indicating). That goes up and down like this (indicating).

Q. What I want to know is this: You didn't replace this washer which is on this end and goes up and stops the water, did you? A. That is the one that I put on, is the one that stops the water.

Q. Well, this washer in here (indicating), does that stop the water also? A. Yes. That helps to stop it. But that washer, if it wears out, it don't do as much harm as this one (indicating). It doesn't make the spigot leak.

Q. Is that (indicating) the one that you replaced? A. That (indicating) is the one.

Q. This bottom one which you described before as hard rubber? A. Yes.

Q. Didn't you say a few moments ago that that was the one that you replaced, to this jury? A. Well, I didn't know until I unscrewed them.

Q. You didn't know until you unscrewed that that that was the one that you replaced? A. No, because this here (indicating)—that don't come out

226 Q. Albert, let me ask you this question: Don't you know that this washer right in here (indicating) is the washer that prevents the water from coming out, on the handle of the spigot, and this washer right on the bottom (indicating) is the one that controls the flow of water into the faucet itself? Do you know that? Am I correct on that? A. I guess you are.

Mr. Lynch: Thank you very much.

By the Court:

Q. Do you know what the shape of that washer was that you put in there? A. Yes.

Q. What shape was it? A. It was a flat and round washer.

Q. About the size of a quarter? A. A black washer.

Q. Like that (laying a 25-cent piece on the bench before the witness)? A. Nothing like that.

Q. A little thicker? A. No.

Q. Hollow in the middle? A. About that thick, but it was small.

Q. Was there a hole in the middle of the washer? A. Oh, yes, sir.

227 Q. That is the kind of washer you are talking about? A. Yes, sir.

Q. Do you know where you put it? A. Oh, yes. Put it on the spigot.

Q. Yes, I know. There are two parts of the spigot, now.

Redirect Examination

By Mr. Arth:

Q. Albert, it was not a spigot like this? A. No, sir. It was not.

Q. Now, you put on one washer? A. One washer.

Q. Do you know whether it was rubber or composition or what it was? A. It was one of them flat, black ones. I don't know—

Q. Flat, black ones? A. Yes, sir.

Q. You put it right on the little place there that it made for it? A. Yes, sir.

Q. That is the way you screw that piece in? A. Yes.

Q. And you turn that screw down? A. Yes.

Q. And then screw that valve back in there? A. Yes.

228 Q. That is all there is to it, isn't it? A. Yes.

Q. Now, Branham, do you understand that these handles turn the same way to go or off, or do they turn

opposite ways? When you turn this here (indicating the drawing that the witness had made on the blackboard) does it go opposite to that other one? A. Yes, sir.

Q. Did you ever see a spigot like this before, Branham (indicating the spigot that the bailiff had brought it)? A. No, sir. I never seen one like that.

By the Court:

Q. Did you ever work on that hot spigot? Did that ever leak? A. Oh, yes. The hot water spigots leaks too.

Q. I am asking you about this one in this apartment. A. Oh, yes. I have worked on it, but not lately. What I mean, I hadn't worked on it soon, you know.

Q. Did you notice any crack in this porcelain on there, those handles? A. No, sir.

Q. Neither was cracked? A. No, sir.

Q. Did you ever see that crack (indicating Plaintiff's Exhibit 2)? A. No, sir.

229 Q. If you had seen it, would you have taken off the handle? A. Oh, yes. I would have taken it off and changed it if it had been cracked.

The Court: Call your next witness.

Mr. Lynch: May I ask one question, if your Honor please?

The Court: Yes.

Recross Examination

By Mr. Lynch:

Q. You have never seen a spigot like this, the one that you have just taken apart or I have taken apart? A. No, sir. I haven't worked on one like that.

Q. And you haven't worked on one like that? A. No, sir.

Mr. Lynch: That is all.

* * * * *

230 **Mrs. Virginia B. Gregory** was produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Arth:

Q. Mrs. Gregory, what is your full name, please? A. Virginia B. Gregory.

Q. Where do you live? A. 133 Webster Street, Northwest.

Q. How long have you lived there? A. About nine years.

* * * * *

Q. Are you employed at the apartment? A. I am.

Q. What is your employment? A. Resident Manager.

231 Q. How long have you been resident manager of the apartment? A. About nine years.

Q. Do you know Mr. and Mrs. Varner? A. I do.

Q. Do you recall a time in October, 1939, an incident in connection with the bathroom fixture of the Varner apartment? A. Only that the janitor came to me and told me that the spigots were leaking in that apartment.

Q. Do you recall when that was? A. The latter part of that week.

Q. Would you say it was Wednesday or Thursday, or when? A. Thursday, I believe.

Q. Thursday? A. Yes.

Q. What did you do? A. I went to the apartment where the plumber was working, which was No. 2, and told him that when he finished with the job, to put a washer, or to fix those spigots in that apartment.

Q. To fix the spigots? A. In the bath tub.

Q. Did he tell you that he did that job? A. No. He didn't. He didn't finish his job.

Q. Did you say anything to Branham next morning? A. No, sir. The next morning, when Branham took the
232 trash out, he told me that Mrs. Varner had complained again that the spigot was leaking and she would like to have it fixed.

Q. What did you tell Branham to do? A. I told him to go and see if he could fix it.

Q. To do what? A. To go there and fix it.

Q. To put new washers on? A. Yes.

Q. So I assume. Did he do that? A. He did.

Q. Did you give him any washer? A. No. I didn't.

Q. Did you give him any instructions—Did you have any washers? A. No. I didn't at the time. He came back to me and told me that he was out of washers.

Q. Then what? A. I looked in my box where I kept mine, and I was out. So the hotwater man was working in the basement, and I told him to go to him and get some washers from him; and he did and fixed it.

Q. And did he come to you later and report? A. I saw him later on in the day and asked him if he got it fixed. He said, "Yes, I fixed it; but it is still leaking a little, but that will take up."

233 Q. That, you say, was on Friday? A. Yes, sir.

Q. Did you have any occasion to give Branham or anybody any further instructions regarding apartment No. 4 later that week? A. You mean, after Friday? No.

Q. Do you remember Sunday of that week? A. Yes.

Q. The 22nd of October? A. That is right.

Q. 1939. Were you in the Varner apartment at any time that day? A. No.

Q. Did you know that Mr. Varner had injured himself there? A. I didn't know it until Sunday morning.

Q. What time Sunday morning was it? A. I don't remember just—It was sometime in the morning, I know. My children were in Sunday School, so it was during the morning.

Q. What time do they go to Sunday School? A. 9:30.

Q. What occurred? A. I heard Mrs. Varner on the porch talking very excitedly. I looked out the window and asked her what was wrong. She said, "Johnnie has cut his hand badly."

234. Q. Then what? A. She went on into her apartment, and I went on about my dishes.

A little later on, why, I called her and asked her if I could keep the children, if she wanted to go to the doctor or the hospital, where they had taken him. She said no, that Mrs. Simonds was keeping them.

Q. Did you later find out how he had cut his hand? A. Well, during that conversation I asked her what had happened. She said, "He cut his hand on the bath tub spigot, on the hot water spigot."

Q. Did you give the plumber any instructions the next day? A. On Monday morning, when the plumber came back to finish his work, I told him to go, before he started the other job, to go into the Varner apartment and fix the spigot.

Q. Did he do it? A. He did.

* * * * *

235 Q. Do you know Al Rhodes, the plumber? A. No. I don't know him personally.

Q. You have seen him? A. I have seen him.

Q. Did he do work for Vito? A. I think he did.

Q. Vito was your plumber? A. Yes.

Q. Did you keep a supply of handles in your apartment? A. I did.

Q. In the storeroom? A. Yes.

Q. When these men came there, you gave them a handle to put on that? A. Yes.

Q. Now, during the week following do you recall anything that happened on Tuesday, October 24, Mrs. Varner calling you about anything? A. Mrs. Varner called me that next week—I don't know exactly whether it was Tuesday or not—and asked me would I have the other handle fixed; that it had a little crack in it and she was afraid that Mr. Varner might cut his hand again.

Q. Said what? A. Asked me would I have this
236 other handle fixed.

Q. Yes. A. And that she—it had a tiny crack in it, and she was afraid they might cut their hand on it.

Q. Did she say anything about the other handle? A. Well, I had— She said, "And the funny thing about it is, the handle that Johnnie cut his hand on was not cracked."

Q. That was, before the accident? A. Yes.

Q. Mrs. Gregory, do you give Branham any instructions to do any plumbing work? A. Only to replace washers in the spigots that are leaking.

Q. And plunging out? A. Sometimes plunging out a sink that is stopped up, if he can get it going.

Q. Vito does a great deal of plumbing work in the apartment? A. He does.

Q. Whenever plumbing work is necessary, or heating work, he does it? A. He does.

Q. Are you still employed at that apartment? A. I am.

Mr. Arth: You may inquire.

237 Cross Examination

By Mr. Lynch:

Q. Mrs. Gregory, you had been in the Varner apartment many times, hadn't you, before this accident? A. I have been there several times. Yes.

238 Q. Did you ever go in their bathroom? A. I don't remember whether I ever did or not.

* * * * *

Q. Do you recall whether you were ever in that bath room at the time it was rented to them in February, 1937? A. Yes. I went in there when I rented it to them, because I went in there to see if it was clean.

Q. But you can't recall whether you were ever in there after that time, between the time you rented it to them and the time of this accident? Is that correct? A. No. I don't recall.

* * * * *

239 Q. On Thursday—Are you sure it was Thursday?

A. Yes, I am.

Q. Positive? A. Yes.

Q. What time of the day was it on Thursday? A. When the janitor came to me?

Q. Yes. A. When he was taking out the trash.

Q. What time was that? A. Between 8 and 8:30: It may have been a little later.

Q. You told him to tell the plumber who was— A. No. I didn't tell him to tell the plumber.

Q. Oh, you didn't say anything to him? A. He told me about it, that Mrs. Varner had complained that the spigot was leaking.

Q. He told you? A. And I said, "Well, I will talk with them," and I told the plumber.

Q. You told the plumber? A. Because when the plumber is working in the building I usually let him do it.

240 Q. I understand. You didn't tell Branham to do anything about it? A. No. Not that morning.

Q. And you went over yourself personally and told the plumber who was working in the apartment about it? A. That is right. I didn't go immediately.

Q. You went in within a reasonable time? A. Yes.

Q. And asked him to go up to apartment No. 4, which was the Varner apartment, and to check the spigots in the bath tub? A. I told him to go to apartment 4 and put— fix the spigots in the bath tub.

By the Court:

Q. Was apartment 4 the Varner apartment? A. That is right.

By Mr. Lynch:

Q. What was he doing in apartment 2? A. As well as I remember, I think he was putting in a new hot water line.

Q. A new hot water line? A. Yes.

Q. Do you know how long it takes to put on a spigot, Mrs. Gregory, or to fix a spigot? A. Put a washer on it?

241 Q. Yes, or anything else to stop a leak. A. Well, it just depends on who is doing it. Some people—

Q. Let us say, a registered plumber, one of Vito's men. A. I wouldn't know how long it would take. If he

just had to put a washer in, it would be about twenty minutes. If the had to grind out a seat or something like that, it would take longer.

By the Court:

Q. Do what? A. Grind the seat where the valve seats.

Q. Do you know about that? A. Yes. We have to do it.

By Mr. Lynch:

Q. And you know, because the plumber has told you, that a lot of times when you put the washer on there, it won't stop the leak because the seat or the place in the pipe where the valve connects is worn? That is what you call the seat, isn't it, Mrs. Gregory? A. That is right.

Q. Then they have to take and regrind that seat, just as they used to regrind the valves in the old cylinders of automobiles? You remember that, don't you, Mrs. Gregory? A. That is right.

Q. That is what they do with the valve in a spigot, don't they? A. Yes.

242 Q. Branham didn't regrind the seat of this valve, did he? A. No.

Q. Did you ask him what he did? A. Ask who?

Q. Branham, after he came from the Varner apartment. A. I asked him if he got the washer put on, and he said he did. Branham doesn't have the tools to grind those valves.

Q. And he told you it was still leaking? A. That is right. Dripping.

Q. Still dripping. Did you see the plumber go that afternoon over to apartment 2? A. No, I didn't.

Q. Was he there on Friday morning, the plumber? Did he return on Friday morning? A. No.

Q. He did not? A. Not that plumber. No.

Q. Another one came? A. The furnace man came.

Q. Was the furnace man a plumber? A. No. He only worked on the hot water boiler in the furnace room.

Q. Was he from Vito's? A. That is right.

* * * * *

243 Q. Don't you know, Mrs. Gregory, as being resident manager of an apartment house for—Is it seven years or nine years? A. About nine years.

Q. —about nine years, that a plumber either works on water lines or on furnace lines or hot water heating plants? Don't you know that? A. I don't know that these men were working on the hot water boiler. But they were dirty when they came up, and when they do that kind of work, they don't go in apartments.

Q. Did they work there all day on Friday? A. No. I don't think they worked all day.

Q. In any event, did you send Branham to them to get a washer? A. I did.

Q. And they had a washer? A. They had.

Q. And they had a washer in the kit or the equipment that they bring with them, didn't they? A. It was on the truck. I don't know if it was in their equipment or
244 not.

* * * * *

Q. Did you ask them anything as to whether the man was to come back and work further on apartment 2 on Friday morning, when they were working in the furnace room? A. You mean, ask the plumber?

Q. Yes, ma'am. A. No, I didn't.

Q. Did you call up Mr. Vito and tell him that you had spoken to the plumber who was working in apartment 2 and asked him when he finished to go in apartment 4, and he hadn't done that, and to have him come back on Friday morning? Did you do that? A. I called the plumber on Friday morning for some reason—I don't remember what—and they said that he wouldn't be able to get there on Friday.

* * * * *

245 Q. I want to get that straight. Branham went and got a washer from them; is that right? A. That is right.

Q. Now, on Monday were the plumbers working there again, on Monday, October 23, 1939? A. Yes, sir.

* * * * *

246 Q. On Monday did you give them a handle of a spigot to replace in the bath tub for the Varners? A. I did.

* * * * *

By the Court:

Q. Do you know when these folks moved out, the
247 Varners? A. I think they moved out in August of 1940.

Q. August of 1940? A. I think it was about that time.

* * * * *

249 Redirect Examination

By Mr. Arth:

Q. Mrs. Gregory, was the bathroom fixture in your apartment removed the other day? A. Yes.

* * * * *

(Mr. Arth produced a bathroom fixture.)

Mr. Arth: Is there any question in your mind about this being the same kind of spigot?

* * * * *

250 Mr. Lynch: Have you got the handles?

Mr. Arth: I have got some handles in here.

(Mr. Arth produced two handles, and Mr. Lynch tried one on the fixture.)

* * * * *

By Mr. Lynch:

Q. Did this come out of your bath tub? A. Yes.

Mr. Lynch: I have no objection to your using it and showing it to the witness, Mr. Arth. Not at all.

(Witness excused.)

Whereupon **Albert Rhodes** was produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Arth:

Q. Mr. Rhodes, will you give your full name? A. Albert Rhodes.

Q. What is your address? A. 602 Irving Street, Northwest.

Q. What is your occupation, Mr. Rhodes? A. 251 Plumber.

Q. How long have you been a plumber? A. I have been a plumber fifteen years. I have been four years an apprentice and fifteen years a plumber.

* * * * *

Q. For whom have you worked? A. I have worked for Bovelli and Vito and Costello.

Q. Did you work for your father? A. I worked with my father at Flood's.

Q. Your father is a plumber too? A. Yes.

Q. Do you have any brothers who are plumbers? A. I have a brother who is a plumber too.

Q. How long did you work for Bovelli? A. Twelve years.

Q. After that whom did you work for? A. I worked for Vito six months.

* * * * *

Q. Where are you now employed, Mr. Rhodes? A. 252 Costello.

Q. The Costello Engineering Company? A. That is right.

Q. Are you a master plumber? A. No, sir. A journeyman plumber.

Q. What is a master plumber? A. A master plumber has a license.

Q. To do business? A. In business. That is right.

Q. Now, in connection with your work, Mr. Rhodes, have you had occasion to deal with all kinds of plumbing fixtures? A. Yes, sir. Definitely.

Q. Are you familiar with all of them? A. Yes, sir.

Q. While you were with Mr. Vito did you do any work at the apartment house at 133 Webster Street? A. Several jobs. Yes, sir.

Mr. Arth: Have you any objection to those (indicating some papers)?

* * * * *

Mr. Lynch: If your Honor please, I have no objection to all five of the papers that Mr. Arth has. Each paper consists of two sheets. There are five folders, each folder being two sheets of paper. I have no objection to 259 all of them going in evidence.

* * * * *

The Court: Do you want them all?

Mr. Lynch: I want them all.

Mr. Arth: It makes no difference to this case—

The Court: Mark them so we can identify them.

(The papers referred to were marked Defendant's Exhibits 2 to 6, inclusive, being papers referred to as plumbers' time sheets.)

By Mr. Arth:

Q. Now, Mr. Rhodes, I show you a photograph of the bathroom. How does the size of that bathroom compare with the bathrooms of today for apartments? A. Very large.

Q. You have been in it? A. Oh, yes.

Q. Without looking at the picture can you say whether it is large or not? A. In comparison with today, very large.

Q. Now, will you look at the time sheets of Vito, Incorporated, and pick out any that may be there that involve your work on that apartment house? A. That is 260 the only one (indicating Defendant's Exhibit 4).

Q. Now, referring to Defendant's Exhibit 4, can you say whether or not you did any work in apartment No. 4 on the 23rd of October, 1939? A. Yes. I repaired a bath tub.

Q. What did you do? A. I reground the spigots and put new washers in. In other words, I put—

By the Court:

Q. Oh, come now. Talk up so that that end man on the jury can hear you. What did you do on October 23rd, 1939? A. Reground the spigots and put new washers in.

Q. You did what? A. Reground the spigots.

Q. Reground the spigot? A. That is right.

Q. And put a new washer in? A. That is right. Two new washers.

Q. Two new washers? A. The hot and cold.

Q. All right. What else? A. Put new hot water handle on bath tub.

Q. Where did you get the handle? A. The manager of the apartment gave me the handle.

261 By Mr. Arth:

Q. Do you know Mrs. Gregory? A. Not unless I see her.

Q. Is she the lady who gave you the handle? A. That is right.

Q. When you say that you reground the spigot do you mean that you ground the seat of the valve? Is that it? A. That is right. The part that the washer seats on.

Q. What kind of a fixture was that, Mr. Rhodes? A. It was a Glauber faucet.

Q. How do you spell that? A. G-l-a-u-b-e-r.

Q. Is that a standard make of faucet? A. Oh, yes, sir.

Q. Are you familiar with the various types and makes of fixtures? A. Yes, sir.

Q. All of them? A. All of them. Yes, sir.

By Mr. Lynch:

Q. Is that a Glauber spigot (indicating fixture that had been taken from Mrs. Gregory's apartment)? A. That is right.

By Mr. Arth:

Q. The whole fixture is a Glauber fixture? A. That
262 is right.

Q. Including the spigot? A. That is right.

Q. I show you this fixture, bathroom fixture (referring to the fixture that was taken from Mrs. Gregory's apartment). I ask you whether or not that is the same type of fixture that you found in the apartment 4 bathroom on the morning of October 23, 1939. A. That is the same type. I couldn't say it is the same faucet.

Q. No. Not the same faucet. The same type. A. That is right.

Q. Now, were there cups just back of the handles, such as you see on this? A. Yes. These shiny escutcheons?

Q. Yes. A. Yes.

Q. They were both on the fixtures, were they? A. Yes

By the Court:

Q. Are those porcelain? A. Porcelain escutcheons.

By Mr. Arth:

Q. What have you to say with regard to the porcelain handles and cups that you saw in connection with
263 the fixture? Are they commonly used? A. Oh, yes. Yes, sir. All makes. All makes use the porcelain.

Q. Do they still use porcelain? A. Not very much.

Q. Is porcelain expensive as compared with— A. Not as expensive as metal. No, sir.

Q. Is it used pretty generally—was it pretty generally used up to the present time? A. At one time they were all porcelain escutcheons and all porcelain handles.

* * * * *

Q. That is a good type construction? A. That is right.

Q. Now, will you explain to the Court and jury how the water is turned on and off on both faucets of that fixture (placing the fixture on the railing in front of the witness)?

A. This (indicating) being the cold water, naturally you have to turn it this way (indicating) to turn it on, and turn it to the right to turn it off (demonstrating).

Q. And the hot water? A. The hot water being on the left side, you have to turn it like this (indicating). Both faucets are turned down when they are off. In other words, it is a right-hand valve. You can turn it either
264 way.

* * * * *

Q. Let us get right down to this. Do you recall the position of those handles when you went to that apartment house? A. Of the handles?

Q. Yes. A. Yes, sir.

Q. Like that (indicating)? A. Yes.

Mr. Arth: I would like to call the attention of your Honor to the fact that that position is the same as that drawn by Branham on the blackboard.

Mr. Lynch: I object to that statement and move that it be stricken from the record.

The Court: The jury sees the article and the drawing on the blackboard. They see the fixture in the hands of this witness. The motion is overruled. It is for them to tell, after all, for them to make a comparison.

By Mr. Arth:

265 Q. Mr. Rhodes, will you say whether or not the hot water handle, or the piece of it that was left there when you went there, was in the position that you have it in now—upright? A. No, sir.

Q. Was the cold water handle upright? A. No, sir.

Q. Are those porcelain handles strong? A. Oh, definitely. Yes, sir. Every make, I believe, as far as porcelain is concerned. That is standard equipment—porcelain handles.

Q. Even today? A. Today you can get them, but they use mostly metal. They are going back to porcelain now.

Q. Going back to porcelain now? A. That is right.

Q. Why is that? A. Well, I guess, the war.

Q. I show you what has been offered here in evidence by the plaintiff as the handle upon which the plaintiff cut his hand (handing the witness Plaintiff's Exhibit 2). What experience have you had in connection with these handles, Mr. Rhodes? A. Just what do you mean?

Q. How much experience have you had in handling those, cracked and otherwise? A. Well, in twelve years the
266 biggest thing in my experience—

* * * * *

A. (continued)—my biggest experience is that handles, if one breaks, they have either been struck or dropped. Of course, I never seen a handle break. I couldn't say. But that is my experience.

By Mr. Arth:

Q. Did you ever break a handle yourself? A. Only by dropping it.

Q. By dropping it?

* * * * *

Q. Did you ever break a handle by hitting it or anything like that? A. No, sir.

Q. Did you ever handle any cracked handles? A. Oh, yes, sir.

Q. Now, will you tell the Court and jury the construction of that handle? A. Well, it is just a metal spud, what we call this metal part (indicating). And then it has a protruding, about a one-inch stem. And then this (indicating) is cemented on that stem. That is cemented on there, and the stem is about one inch long.

Q. The stem goes through the porcelain? A. The
267 hollow of the handle.

Q. The hollow of the handle? A. I mean, it is cemented on there.

Q. Can you say whether or not that is a clean break? A. It is pretty dirty. It was clean.

Q. When you saw it? A. That is right.

Q. Was there any blood on the handle when you saw it? A. Yes. There was one spot of blood.

Q. Which part of the handle did you see it on? A. This part right here (indicating).

* * * * *

Q. What did you do with that? A. I gave it to the lady in the apartment.

Q. Did she ask for it? A. That is right.

By the Court:

Q. What part did you give to her? A. The metal part, with the metal spud on.

Q. This part (indicating)? A. Yes. I took that off the faucet and gave it to her.

By Mr. Arth:

Q. Did you characterize the nature of that break?
268 A. No. I didn't do it with any intention of that.

Q. Is it an old break or would you say it is a new break? A. Oh, it was a new break. Yes. It was very clean. I remember definitely the spot of blood that was on it.

Q. On the handle? A. Yes, sir.

By the Court:

Q. Would you say that it had been broken before, the handle? A. It was not broken before. It was perfectly clean. If it had been cracked, naturally an accumulation of dirt would have gotten in the crack. What I mean, it was not cracked. I paid particular attention to that, because, when she said she wanted the handle, I figured there was some trouble about it.

Q. Talk to the jury. About what? A. When she asked for the handle, naturally I figured there was some trouble there. She told me that someone had cut their hand. I don't remember whether she told me it was her husband. She did tell me that someone cut his hand. There was a spot of blood on that porcelain part, because it is dimly on there now. That naturally was very clean, and the blood showed up very plain.

By Mr. Arth:

Q. Could you say definitely that there was not an old crack in it? A. Oh, yes. Yes, sir.

269 Q. Mr. Rhodes, seating a valve is a job that must be done by somebody who is familiar with that operation and who has the tools to do it with? A. Definitely. Yes, sir.

Q. And that is what you did with both these fixtures? A. That is right. Equivalent to in an automobile, when we used to grind the valves. The same thing in a faucet. You reseal them. In other words, you smooth the seat. That is equivalent to grinding a valve in an automobile.

By the Court:

Q. How many places are there for washers in that kind of fixture? A. Well, there is only one washer, and then there is packing.

Q. One washer? Where is that? A. That is on the bottom of the stem of the spigot.

Q. Is there any washer between the handle and the— A. That is just a flat washer. We call it a gasket.

Q. Let us call it a gasket. What is the shape of that? A. That is flat and round. Of course, any washer that fits here would have to be round. I would say it is one inch in diameter, and it is very flat. A very thin washer, made out of hard composition. That is the only two washers that we have. We call that a gasket. We don't call that a washer.

By Mr. Arth:

Q. What is this? (Indicating) A. That is the
270 valve or core of the faucet.

Q. Is that the kind of valve that is in that fixture (indicating)? A. Yes, sir.

By the Court:

Q. Where is the gasket in that? A. That (indicating) is the gasket. It goes right at this point (indicating). This

shoulder butts against it and makes it watertight when it is screwed to the spigot.

Q. And at the bottom— A. —there is a washer. That is a washer.

Q. But the gasket— A. The gasket goes at this point (indicating). We don't call that a washer. We call it a gasket.

Q. And the plumber puts this one on? A. Yes, sir. That is the main washer of the faucet.

Q. The janitor puts the gasket, what you call the gasket? A. The janitor would put these (indicating) on. He would be more apt to put this (indicating) than he would to put the gasket, because I don't believe he would have a gasket.

By Mr. Arth:

Q. Well, this is the washer (indicating)? A. That is the compression washer. Yes, sir.

Q. They are different? Are they of different types?
271 A. That is a different type. Yes.

Q. That (indicating) is composition? A. Yes. There is rubber and there is composition paper.

By the Court:

Q. Are those flat like the gasket? A. There are some flat washers and others that are solid. The gasket is hollow, you know. It has a large hole in the gasket, and it is just a small hole in the washer. It could be flat.

Q. How thick would it be? A. Oh, I would say maybe anywhere from a sixteenth to an eighth of an inch.

By Mr. Arth:

Q. Now, this spigot that has been used here—do you know anything about that? A. That is pretty near as old as I am. That faucet is known as the Fuller faucet. Instead of having a washer, that has a ball.

Do you mind if I take that off?

The Court: Oh, no.

A. (continued) (taking faucet apart) There (indicating) is what is used in place of the washer on this faucet. That is what they call a Fuller ball. You won't find many of them around now.

By the Court:

272 Q. Did they leak? A. They were very good faucets in their time. They are discontinued now. That is what is known as a Fuller faucet.

Mr. Arth: Are you sure, your Honor, that that came out of your room?

The Court: I think they have the same faucets on my washstand. Where did you get that?

The Bailiff: That came from in there (indicating the Judge's chamber.)

The Court: This Court House is pretty old, you know.

Mr. Lynch: Before the Civil War, if your Honor please.

By Mr. Arth:

Q. Mr. Rhodes, it is a simple job to put a washer on? A. Oh, yes. I think anybody can put a washer on.

Q. When you were reseating both those valves, that was for what purpose? A. To smooth the seat out. In other words, the seat—there was rust on it. If you put a washer on, it would just cut the washer, and in a week's time you would have to put another washer on.

Q. They get that way from— A. From the rust that comes up through the pipe naturally; from the hot water boiler, mostly.

Q. And if that rust— A. You see, the rust gets on
273 the seat, and when you close the valve, the washer pushes the rust into the seat, and it becomes pitted there. Then if you put a new washer, which is smooth, there, when you get that pit below the washer and grind it in shutting it off, naturally you are going to cut the washer.

Q. Well, now, you reground both of those valves? A. That is right.

By the Court:

Q. Did you see the top piece of that handle around that bathroom that day? A. No, sir. I didn't see that at all.

Q. Did you ask for it? A. No, sir. I didn't see any reason to, because I would throw the handle away, anyway. But when the lady asked me for it, I naturally gave it to her.

By Mr. Arth:

Q. Mr. Rhodes, I want to ask you about this fixture (indicating the fixture that had been taken from Mrs. Gregory's apartment). Could you turn that off so hard that you could not turn it on without breaking one of these handles? A. It might be possible. I have never seen that.

Q. It might be possible? A. That is right.

Q. Would changing a washer on this create such a
274 condition? A. Changing a washer?

Q. Yes. A. No, sir.

Q. Did you operate the handles yourself? A. I had to to take the faucet apart.

Q. Was it hard to move them back and forth? A. Oh, no. No.

Q. Are those fixtures ordinarily hard to turn on and off? A. No, sir. They are easy.

Q. They are easy? A. This one here, you can see. I can turn it on and off with my fingers with no handles (turning the stem of the valve).

* * * * *

275 Q. Mr. Rhodes, in the process of renewing a washer, any kind of a washer, a flat disc washer, composition, or perhaps hard rubber, but it is a composition, would that handle, after the washer had been renewed, be tight so that ordinary pressure, that more than ordinary pressure would be required to turn the water on?

276 A. You say, a hard fiber disc?

Q. Yes. A. No, sir.

Q. I call your attention to a handle there which you have in your hand. What is the condition of that handle? A. Well, it is cracked.

Q. Put that handle on there, will you?

(The witness put the handle referred to on the fixture from Mrs. Gregory's apartment.)

Q. Put it on the hot water side.

(The witness did as requested.)

Mr. Arth: I call your Honor's attention to the crack in that handle. I found it in some handles in Mrs. Gregory's apartment. That was taken off the spigots in that apartment.

Mr. Lynch: You mean in this apartment? You have No. 2 and No. 4.

Mr. Arth: In any of the apartments.

Mr. Lynch: You mean in the apartment house?

Mr. Arth: Yes.

(Addressing the jury:) That (indicating) is the crack.

(Mr. Arth handed to the jury the handle just referred to. The jury passed it around.)

Mr. Arth: Now I call your attention to this handle, that it is cracked. That is the handle in question (showing Plaintiff's exhibit 2 to the jury).

277 Mr. Lynch: May I see it, Mr. Arth?

Mr. Arth: Yes, sir. (Handing Mr. Lynch the first handle referred to.)

(Mr. Arth placed the first handle on the fixture from Mrs. Gregory's apartment.)

By Mr. Arth:

Q. Mr. Rhodes, in the upright position of that handle now is the hot water turned off or is it turned on? A. Now?

Q. Yes. A. It is off.

Q. It is off? A. Yes, sir.

Q. Now, in order to turn it on what would you have to do? A. Turn it this way (indicating).

Q. Is that the way that hot water spigot worked when you went there to repair it that day? A. Oh, absolutely.

Mr. Arth (addressing the jury): There is the broken handle. Take it yourselves and see how you would turn it off, and see if anything happens to you no matter how much pressure you put on it.

* * * * *

278 (Mr. Arth handed to the jury the fixture from Mrs. Gregory's apartment.)

Mr. Arth: All of you take hold of it and turn it on.

(The jurors passed the fixture from one to the other, and each juror tried the handle, turning it off and on.)

Mr. Arth: Now, we have two positions to that handle.

By Mr. Arth:

Q. (taking fixture to the witness stand) Will you turn that off so that that handle is in the position in which you found the stub on the morning when you went in there?

(The witness took the handle off and put it on in the opposite direction to which it had been before.)

A. That may not be exact, but it is near it, more
279 or less.

(Mr. Arth handed the fixture to the jury again. The jurors passed it around, and each one tried the handle again.)

* * * * *

280 A Juror: May I ask a question? Would screwing that spigot top hold this from turning (indicating)?

The Witness: No, sir.

A Juror: Can you put a little screw on that?

Mr. Arth: Yes.

(The witness put a screw in the end of the valve stem.)

The Witness: That won't come off.

Mr. Arth: Now give me that position again.

(The witness indicated a position of the handle.)

281 The Court: How was he facing?

The Witness: Sitting this way, it would be this way (indicating).

(Mr. Arth handed the fixture from Mrs. Gregory's apartment to the jury again. The jurors passed it around, and each one tried the handle again. When it came to Mr. Davis, he took a handkerchief from his pocket, folded it several times, placed it over the handle, and, placing the fixture beside his chair, tried the handle.)

Mr. Davis: Oh, it broke in my hand.

Mr. Arth: It did?

Mr. Davis: Yes.

The Court: You put unusual pressure on it, didn't you?

Mr. Davis: Yes, I did.

Mr. Arth: Did you have a handkerchief on it?

Mr. Davis: I put my handkerchief on it.

The Court: You put unusual pressure on it.

(Mr. Arth took the fixture and handed it to the witness.)

The Witness: Even after it is shut off hard, you could turn that on with the handle broken (demonstrating).

Mr. Lynch: May I see that broken handle, please?

Mr. Arth: Yes (handing to Mr. Lynch the broken handle).

A Juror: May I ask a question there?

The Court: Yes.

A Juror: If you tightened that up very tight, would
282 that interfere with turning the handle?

The Witness: The only difference it would make is that in this turning here there wouldn't be any play.

The Juror: Would that make it any harder to turn?

The Witness: If it was dry packing, it would.

By Mr. Arth:

Q. What do you mean by that? A. Cord or something like that.

Q. The washer would not interfere with it? A. No.

The Juror: I am talking about packing.

The Witness: If it was cord or something like that and you draw it up very hard.

By the Court:

Q. Is there packing in this (indicating)? A. Packing inside here (indicating).

Q. That is what you are talking about, sir? A. The packing goes way down in here (indicating). You have to take this out (indicating) and then pack it and then screw this back in.

Q. But putting a new washer in would not affect it? A. Wouldn't disturb that.

Q. It would have nothing to do with it? A. No, sir. Absolutely.

By Mr. Arth:

283 Q. Now, Mr. Rhodes, how many of these handles in your time do you suppose you have worked on? A. How many handles?

Q. Yes. A. Oh, I couldn't say.

Q. What? A. I could say. I couldn't begin to say.

Q. Hundreds or thousands? A. I guess there were thousands of them. Twelve years I worked on repair work, nothing but repair work.

* * * * *

284 Q. Mr. Rhodes, if that handle were upright, this way (indicating), with the water closed off—Is it closed off now? A. Yes.

Q. (continued)—and the spigot was dripping, if that spigot were dripping, and you were going to give it a knock to try to make it close off any tighter, you would have to hit

it from that side (indicating), wouldn't you? A. To close it off, yes.

Q. To close it off tight? A. That is right.

Q. And if it were down here in that position (indicating), in which you say you found it— A. That is right.

Q. —you would have to knock it there (indicating), wouldn't you? A. Knock it down.

* * * * *

285 Cross Examination (Continued)

By Mr. Lynch:

Q. Do all spigots work the same way? A. Do all spigots work the same way?

Q. Yes. A. Yes.

Q. All turn the same way? A. Yes. That is right. All lever handles do.

Q. As you face it you always turn it to your right? A. You push down to shut them off. In other words, the hot water you turn to the left to shut it off facing the spigot.

Q. You could never turn it to the left to open a faucet, could you? A. No, sir. Not a lever handle.

A Juror: May I ask a question here?

The Court: Yes.

By a Juror:

Q. Is it possible for these spigots, when people repair them, to have the handle put on different? A. In no way that I can see. The hot water has to shut off down.

Q. Because the hot water is on one side, the spigot itself, or whatever you call that little thing— A. Interchangeable, you mean? Q. Yes.

286 A. No, ma'am.

Q. Would it work if it were done? A. No. In other words, the water would continue to run. You wouldn't be able to shut it off.

The Court: I don't clearly understand what you are trying to get at.

The Witness: She asked me if they were interchangeable.

The Court: You mean the valve inside?

The Witness: That is what she means.

A Juror: She means the outside.

The Witness: Oh, the handle?

By a Juror:

Q. Could you take the handle and put it on the hot water spigot? A. Oh, yes. You can.

Q. Would it make any difference? A. No difference whatsoever.

By the Court:

Q. They all turn the same way? A. Oh, yes. Sure. It would just be a matter of being mismarked.

A Juror: That is what I mean.

By Mr. Lynch:

* * * * *

288 Q. I understand that this is not the same type at all (indicating faucet that had been brought from the Judge's chambers)? A. That is right.

* * * * *

289 Q. And the one which was in the bathroom in this apartment which was occupied by Mr. Varner had a different type washer, didn't it? A. Altogether. Yes, sir.

Q. It was sort of a flat washer, wasn't it? A. Flat washer.

Q. But it served precisely the same purpose? A. The same purpose. That is right.

Q. When you speak about the seat—I am using this one because it is already open— A. But that is altogether different. That shuts off up here (indicating). The other shuts off at the bottom.

* * * * *

291 Q. Now, when you put on a new washer, and you turn the handle of the spigot, and the seat of the valve is not right, it doesn't stop the leak, does it? A. It would have a tendency to drip.

Q. Because if it were done properly it would not drip, would it? A. That is right.

Q. And then you tell when it needs reseating—Reseating is merely a grinding of that little valve in there, isn't it?

A. It is not a valve. It is a seat. You take the rust spots off the seat.

Q. So that the valve, when it either comes up against it or goes down against it, it will be nice and flush and tight?

A. That is right.

Q. And stops it immediately? A. That is right.

* * * * *

294 Let us get some more of these slips. This is Defendant's Exhibit No. 6, October 19. "Wentz and Frank." A. That is another fellow.

Q. They were the plumber and helper? A. Yes.

Q. They were there on the 19th? A. That is right.

Q. That is 1939? A. 1939.

Q. They came there at 11:30? A. 10:30.

Q. And worked till 12? A. Yes.

295 Q. And started at 12:30 and worked until 4? A. 4:30. That is right.

Q. They were working in apartment 2, weren't they? A. Yes, sir.

Q. Running a hot water line under the cement floor in apartment 2? A. Yes.

Q. And installing vapor valve in apartment No. 5? A. That is right.

Q. Referring to Defendant's Exhibit 5, on the 20th, on Friday—what is that? Casey? A. Casey and Vic.

Q. Plumber and helper? A. That is right.

Q. They came there at 10:30 in the morning and left at 11:30? Is that right? A. That is right.

Q. Installing—what is that? A. Klixon valve. That is the number of the valve—I C L.

Q. I C L storage tank? A. Yes.

* * * * *

296 Q. Now, let us go to Defendant's Exhibit No. 3. On the 19th King was the one that— A. He was a steamfitter.

Q. He was there, wasn't he? A. That is right.

Q. "Something wrong with dump trap." What is a dump trap? A. In other words, that is a sunken place in the water return to the heating plant.

Q. You open up some valve and clean it out? A. You take it out and clean out the sediment that gets down in the bottom.

Q. In the pipe or in the trap? A. The trap. It is a cast-iron trap.

* * * * *

301 Q. And didn't you say on your direct examination in response to Mr. Arth, when he was asking you about these valves and about the seat of valves and about the putting on of new washers, that if the seat of the valve was worn and you put on a new washer, that the only way you could keep it from dripping would be to turn it very hard? Isn't that right? A. I don't remember saying that.

Q. You didn't say that right now? A. I don't remember saying that.

Q. Isn't it true that that is the way to stop a drip, when you reseal a valve and they want to stop the drip— A. Put on more pressure.

Q. You would put on more pressure? A. Absolutely.

Q. And you would turn it harder? A. Absolutely.

Q. When you turn it harder, that doesn't have any effect whatever on the handle, does it? A. Oh, yes. Certainly.

* * * * *

Q. It would make that harder to turn, wouldn't it? A. I don't think so. You mean the operation of turning it off?

Q. Yes. A. It wouldn't make a bit of difference in it.

Q. If that screw— A. I don't care how hard you turn that. When you turn that (indicating)—

Q. I didn't say that. I asked you about turning this valve (indicating) in tightening it, because you are not reseating it. You put in a washer and you turn it until it is very hard, to get that washer to go up to that corroded seat of that valve so as to stop that leak? A. That is right.

Q. That would involve putting a lot of pressure on it. That of necessity would make it turn on and turn off, that handle, harder, wouldn't it? A. I don't understand that.

I don't believe, as far as the motion of the handle is
303 concerned, it has an effect, no matter how hard it is closed.

Q. No matter how hard it is closed? A. No matter how hard it is closed.

Q. When that is turned hard, that moves the washer, doesn't it? A. Moves the washer. That is right.

Q. If the washer has been screwed or turned in very tight, necessarily you have to put more pressure on the screw, don't you? A. On the handle. That is right.

Mr. Lynch: That is all, your Honor.

A. (continued) But it is not any harder to open after you close it.

* * * * *

Redirect Examination

By Mr. Arth:

Q. Mr. Rhodes, the only purpose in reseating a valve is to get a proper fitting between the seat of the valve and the valve itself? Isn't that correct? A. The purpose of reseating is to make the seat smooth.

Q. Smooth? A. In other words, so that when the washer goes down there won't be any small pits for the water to seep through and cause this drip.

304 Q. When you have a drip in a spigot, putting in a new washer does not always remedy it, does it? A. Very true. Very true.

Q. Then, if it continues to drip, then you reseal it? A. That is right.

Q. That is what you went there for on Monday morning; isn't that right? A. That is right.

* * * * *

Robert J. Barrett was produced as a witness on behalf of the plaintiff, in rebuttal, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lynch:

Q. Will you give the Court and jury your occupation? A. At the present time, chief plan examiner for the Plumbing Department, District of Columbia.

Q. Are you a registered plumber? A. I am.

* * * * *

307 Q. Can a person who is capable of knowing how to put on and take off a washer—if a washer is put on, may it be screwed very tightly by the person who installs it, in such a way as to make it difficult to turn the handle of the spigot thereafter? A. No.

Q. It would not? A. No. Couldn't do that.

Q. How about the packing? A. The packing, no. I
308 wouldn't say that that could be tightened to that extent there.

Q. Could it make it difficult to turn off? A. Make it difficult to turn off, but not to open.

* * * * *

315 **Albert Rhodes** was called as a witness on behalf of the defendant, in rebuttal, and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Arth:

Q. You are a practical plumber. Did you ever renew a washer on a valve, and, when you examined it, find it continued to leak? A. Yes, sir.

Mr. Arth: That is all.

Cross Examination

By Mr. Lynch:

Q. Did you in your examinations find that if a valve were put on and properly done, it would stop the drip? A. Properly done?

Q. Yes. A. Yes, sir.

Mr. Lynch: That is all.

Redirect Examination

By Mr. Arth:

Q. Mr. Rhodes, if it were properly done and the valves needed grinding? A. It would not be properly done, then.

Q. You mean from a plumber's standpoint? A. That is right.

Q. But from the point of renewing a washer that would follow, wouldn't it, that there might be a drip? A. Oh, yes. Sure. But he asked me "properly done."

Q. But when you speak of "properly done," you are talking about grinding the valve? A. That is properly done.

* * * * *

Q. But every time you put a washer on a spigot you don't grind the valve? A. Oh no.

Recross Examination

By Mr. Lynch:

Q. Mr. Rhodes, if a washer is put on in the spigot, and after it is put on it continues to drip, then, of course,

317 if you leave it that way it is generally defective, isn't it? A. That is right.

Mr. Lynch: Certainly.

By the Court:

Q. Let me ask you one question. I want to know, if you put a new washer on and it continues to drip a little while, will it clear up and stop the drip? A. Some people say yes, but in my experience, no.

* * * * *

318 (The jury retired from the room.)

Motion for Directed Verdict

Mr. Arth: If your Honor please, I want to renew my motion to direct a verdict in this case for the defendant.

* * * * *

(Discussion on motion not transcribed.)

The Court: I will overrule that motion. I will submit this matter to the jury. I have grave doubt about it myself, whether I am right or wrong, but I think perhaps I had better let the jury pass on the question.

* * * * *

325 Mr. Lynch: If your Honor please, on yesterday a witness testified, and I talked with him later. There was a mistake in his testimony. I would like to call him this morning and correct it. May I call him?

The Court: Yes.

326 Whereupon **Robert J. Barrett** was recalled as a witness on behalf of the plaintiff, in rebuttal, and, having been previously sworn, was examined and testified further as follows:

Direct Examination (Cont'd)

By Mr. Lynch:

Q. Mr. Barrett, you testified on yesterday in this same case? A. Yes, sir.

Q. Now, Mr. Barrett, I will ask you whether or not when you testified yesterday with regard to a spigot being turned off and turned on, I asked you where the washer is screwed in very tight, and if the spigot had to be, or rather, the valve had to be reseated, and was not reseated, and the spigot was turned off, would that make it harder to turn off or easier to turn on. A. That naturally would make it hard to turn on as well as it would off, because anything, using force to close anything, naturally it is going to use force to open it again.

Q. If you said the contrary yesterday, were you in error?

A. I was in error. I must have misunderstood.

* * * * *

327 (The following proceedings were had at the bench, out of hearing of the jury:)

Mr. Arth: Your Honor, I would like to have the stenographic record show exactly what was done by the juror in respect of the manipulation of the handle on the faucet on yesterday. I would like it shown that the handle, a
328 cracked handle, similar to the one upon which this plaintiff alleges he cut his hand, was placed on the fixture in the same position that the plaintiff said the handle was at the time that he injured himself; that all the members of the jury manipulated that handle in the relative position that the plaintiff was at the time he said he manipulated it.

Then the handle was placed in the position in which the witness Rhodes said that the handle was found, the stub of the handle was found by him, and which the janitor Branham also had testified was the position of it when he left the fixture; and that the jury turned it on and off, all the members, also in the relative position of the plaintiff at the time he is alleged to have injured himself.

And then when the fixture was handed to the jury and they were told to turn the handle downward to see what would happen—Let me get that in the record straight. I

want your Honor to tell that last thing that happened. Then we will understand that this juror, Mr. Davis—I think that is his name—took out his pocket handkerchief, folded it into a square about the size of that (indicating); and he put it in the palm of his hand and took hold of the fixture and applied excessive force to it, holding his hand on the back of the fixture, and pushed downward on it and broke it, pushing against it when it was on the spigot, when it was turned on.

329 Now, that is the way that was done.

The Court: You mean the way that the juror broke it?

Mr. Arth: Yes.

The Court: Oh, I was looking right at him.

Mr. Lynch: I was not, your Honor. I didn't see it.

The Court: He pressed it down.

Mr. Arth: Yes. Downward.

Mr. Lynch: I object to anything going into the record other than what is already there. I object to any statement of Mr. Arth's going in the record in the nature of evidence or a stipulation of evidence or a statement of what happened.

The Court: We are talking about what took place among the jurors in examining this that way (indicating) and undertaking for themselves to manipulate it.

Mr. Lynch: Yes.

The Court: That was my observation.

Mr. Lynch: It was not my observation. I didn't see him.

The Court: You certainly saw them manipulate it?

Mr. Lynch: I saw them touch the handle from time to time.

Mr. Arth: Then the last time—

Mr. Lynch: But the degree of force that was used, I didn't see that.

The Court: The juror himself admitted, when I asked him, that he used force. That is in the record.

Mr. Arth: Yes.

330 Mr. Lynch: Yes.

The Court: So I think that is all right. That is a picture of what happened.

* * * * *

331 The Court: I was going to refuse definitely Plaintiff's No. 5 and Plaintiff's No. 6.

Now, you say Plaintiff's No. 1 does not state the law and you object to that?

332 Mr. Arth: Oh, yes.

* * * * *

The Court: I am giving that No. 1. I will give you an exception.

* * * * *

344 *Charge to the Jury*

The Court (Luhrling, J.): Ladies and gentlemen of the jury, there was no duty imposed upon the defendant owner of the apartment either by law or by the express terms of the lease to repair the spigot in the Varner bathroom. The claim here is not one of failure to repair, but, as we shall see, is one of negligent and careless repair of the spigot.

As set forth in the complaint, the claim which the jury will consider is that on or about October 21, 1939, the defendant through his agents and servants repaired and adjusted a water spigot in the bathroom of Apartment 4, the apartment of the plaintiff at 133 Webster street; and that the repairing and the adjusting, the work done upon the spigot, was done in a negligent and careless and improper manner; that the plaintiff, when he attempted to use the spigot on October 22, 1939, the handle of the same, by reason of the negligent repair and adjustment, the work done by the defendant through his agents and servants, broke, causing injuries to his hand, which finally required the amputation of part of the right ring finger, and will cause him to undergo a further operation upon his hand.

The defendant has answered this claim of the plaintiff and admits that his agent replaced a washer on one of the spigots in the bathroom of the plaintiff's apartment; 345 but denies that the injuries thereby occasioned were caused by or were the result of any negligence on his part or that of his agents. The defendant claims that the injuries were caused solely by the negligence and carelessness of the plaintiff in wilfully applying grossly excessive and unnecessary pressure to the valve handle, thereby causing it to break; and further says that the condition of the spigot was open and obvious to the plaintiff, and his failure to observe that condition contributed to cause the injuries about which he complains; and that he neglected and failed to use due care for his own safety under the conditions and circumstances then and there existing.

The issue here presented is one of negligence. In a general way negligence may be defined as the omission to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do. In other words, negligence is the absence of care according to the circumstances.

There is no doubt that the plaintiff sustained a painful and permanent injury. This may be conceded. But the jury is instructed that they may not infer that because Mr. Varner sustained this injury, the defendant was negligent and careless and that his negligence and carelessness caused it.

You are instructed that it is not sufficient for the plaintiff to show that the defendant may have been guilty 346 of negligence. The preponderance of the evidence must point to the fact that he was guilty of the act or acts of negligence charged in the complaint, and that such negligence was the proximate cause of the plaintiff's injury. If you believe from all the evidence that the manner in which the accident happened is uncertain, then it is not for

you to guess about the manner or cause thereof, and your verdict must be for the defendant.

The burden of proof, therefore, in this case is upon the plaintiff to prove, and to prove to your satisfaction, by a preponderance of the evidence not only that the defendant was negligent in the manner claimed, but that his negligence was the sole cause of the injury sustained. If he fails to do so, your verdict must be for the defendant.

Furthermore, if from all the circumstances in evidence you should find that the plaintiff was negligent and careless in his manner of using the handle of the spigot, and that his negligence and carelessness either caused or contributed to cause the injury he sustained, you must likewise find for the defendant.

You are instructed that if you find from the evidence that the plaintiff was careless of his own safety in operating the porcelain handle in question, and that such carelessness was the sole cause of, or in any degree contributed to, the accident and his injury, then the plaintiff cannot recover in this case, and your verdict must be for the defendant.

347 The Court instructs the jury that in determining the question of contributory negligence, if any, of the plaintiff in this case, you are to consider whether or not the plaintiff used such care and caution under all the circumstances in the case, as shown you by the evidence, as an ordinary, careful, and prudent person would have used under like circumstances. If you find that the plaintiff did use such care, or acted as a person with ordinary care and prudence would have acted, under the circumstances in this case, the Court instructs you as a matter of law that the plaintiff would not be guilty of contributory negligence, and he would not be precluded from a recovery in this case on account of any negligence on his part.

The burden of proving contributory negligence of the plaintiff is on the defendant.

Mr. Lynch: Would your Honor state that again?

The Court: I say, the burden of proof on contributory negligence is on the defendant. Did I say "plaintiff"?

Mr. Lynch: Yes.

The Court: That is all right.

The logical inquiry presented at the outset here is, What duty did the defendant landlord owe to the plaintiff tenant?

The defendant through his agent, the janitor, did undertake to repair the spigot and stop the leak in the plaintiff's bath tub. The law is that when the landlord, whether obligated to do so or not, undertakes to repair the premises, and in doing so negligently creates a defect or
348 danger whereby the tenant, himself in the exercise of ordinary care, is injured, the landlord is liable. But in order for him to be held liable, it must appear that he made the premises more dangerous for use, either by changing the physical conditions of the premises for the worse or by giving them a deceptive appearance of safety, and that the tenant neither knew nor should have known of the danger, and relied upon the deceptive appearance.

It is conceded that there was a leak in the spigot, and that it had been repaired by the janitor by the use of a washer on several occasions prior to this accident. There is decided conflict in the testimony as to when the last repair was made, and as to whether it was the hot or cold faucet that was repaired.

Mr. Arth: Your Honor, did I understand you to say that there is a conflict in the testimony as to whether the hot or cold water faucet was repaired? I know of no conflict.

Mr. Lynch: I say that there is a conflict, your Honor, because Mr. Varner testified that the hot water spigot was leaking. You asked him on cross-examination how he knew that, and he answered by saying that he put his hand under it.

Mr. Arth: There is no evidence here that anything was done to the hot water spigot.

The Court: All right. Omit that. Disregard that. The conflict was when the last repair was made.

Mr. Arth: Yes.

349 The Court: That is what I had in mind.

There is also conflict in the testimony with respect to whether the handle was defective and cracked prior to the accident. That is what I meant.

Both Mr. and Mrs. Varner testify that the janitor made the repair between 5 and 6 p. m. on Saturday, October 21st; and that while he was making the repair, the plaintiff came home from work. On the contrary, both the janitor and the resident manager of the apartment testify that the repair was made on Friday morning, October 20th; and the janitor swears that it was the cold water faucet that he repaired.

Both Mr. and Mrs. Varner testify that the handle of the hot water faucet was cracked and had been cracked for some time prior to the accident, and that they used it in that condition. They said that they complained about the cracked handle, and hence it is urged that the defendant through his agents also knew about it.

The janitor testifies that the hot water handle was not cracked and worked all right, and no complaint was made about it.

You have heard the janitor at length describe just what he did to stop the leak. He said in substance that he first felt the dripping water to determine whether it was hot or cold; and, having found it to be cold, he cut off the cold water at the valve under the wash basin, and then proceeded to remove the handle and other parts of the
350 cold water spigot so as to reach and remove the old washer and insert the new one.

After he had replaced the old washer with a new one, he re-assembled the parts, turned on the cold water at the basin, found the handles worked easily, and thus completed the work of repair. He states that no repair was made on the hot water faucet—

Mr. Arth: May I ask your Honor, what was that last statement?

The Court: He states that no repair was made on the hot water faucet.

Mr. Arth: Your Honor, I think you omitted something in regard to his repair on the replacement of the cold water washer. He said that it continued to leak after he had replaced it.

The Court: Yes. That is true. That is a part of it. I am talking about what he did. He states that no repair was made on the hot water faucet, and that he did not replace or undertake to replace the washer in that faucet.

Now I read to you Plaintiff's Instruction No. 1.

The Court instructs the jury that the duty of the defendant is to use due and proper care in making repairs or replacements in the apartment occupied by the plaintiff; and if the jury finds that the defendant, through his agents and servants, negligently and carelessly repaired or adjusted the spigot on the bath tub in the apartment occupied

by the plaintiff, and as a result of such negligence
351 the handle of the spigot broke and injured the plaintiff's hand, you may find as a matter of law that the plaintiff is entitled to recover, and your verdict should be for the plaintiff.

You have heard the plaintiff describe the manner in which he turned on the hot water. He was seated on the commode and, as I recall, had the morning paper and was waiting for the tub to fill.

After permitting the cold water to run for a while, he reached over with his right hand to turn on the hot water. He said the handle was up, and he used just the ordinary and usual force to turn it. I believe he said, "ordinary pressure." He said the hot water handle was cracked and had been cracked for some time previously.

In this connection the jury is reminded that the only testimony with respect to the actual repair made on the spigot is by the janitor, who made the repair: and he says the repair was made on the cold water spigot Friday morning.

It was the breaking of the handle of the hot water spigot

that caused the injury to the plaintiff. Therefore, if you are satisfied from the evidence that no repair was made or undertaken to be made on that faucet by the janitor, or that no defect or danger was created on the hot water faucet by the repairs made, on the cold one, then your verdict must be for the defendant.

352 Furthermore, and according to his own testimony and that of his wife, the plaintiff knew that the hot water handle was defective and cracked. Having this knowledge of the condition of that handle, the plaintiff further knew or ought to have known that it would at some time break if he continued to use it; and knowing this, it was his duty in the use of that handle in opening and shutting the hot water spigot to exercise ordinary care for his own safety and not use excessive force or pressure and operate that handle and break it. If from all the evidence you find that the plaintiff failed to exercise such degree of care, then you will be warranted in finding that he was negligent; and your verdict must be for the defendant.

There was testimony here by experienced or expert witnesses who gave an opinion in response to a hypothetical question. These witnesses had no personal knowledge of the facts, but they were asked to suppose or assume that certain facts were true and on that assumption or supposition to express an opinion as to the cause of the break of the handle which resulted in the injury. You should consider this kind of testimony along with the rest of the testimony in the case; but you are reminded that its value and weight depend upon whether the evidence shows that the assumed or supposed facts have been established. Obviously, if such facts have not been established by the evidence, then the opinion is weakened to the extent at least that it is based on facts which the evidence does not
353 establish. The jury is the sole judge of the weight to be given to this evidence.

The Court instructs the jury that if your verdict is for the plaintiff, you should award him such sum of money as

will fairly and reasonably compensate the plaintiff for the damages he has sustained and consider those things which would be the natural result of the injury, namely, the injury to his nervous system, if any, resulting from the physical injuries sustained by him, his bodily and physical and mental pain and suffering, and his incapacity to work as a result of the injury, and the money loss suffered thereby; the fact that the plaintiff is crippled, disabled, and deformed, and his shame and humiliation as a result of such deformity; and if the jury find from the evidence that any of the injuries are permanent or reasonably likely to continue in the future, they should award such additional sum as will fairly compensate him for the future pain, suffering, disability, deformity, shame, and humiliation which the jury find are the direct result of the injuries sustained by the plaintiff, such amount not to exceed the sum of \$50,000 as demanded in the complaint.

I have said to you ladies and gentlemen that the burden of proof is on the plaintiff to establish his case by a fair preponderance of the evidence. By a preponderance of the evidence is not meant the mere greater number of witnesses upon the one side or the other, but it means that
 354 evidence which is most convincing and satisfactory to the minds of the jurors. If the evidence is equally balanced, then there is no preponderance, and in such case the plaintiff cannot prevail.

Now, in determining on which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify; their conduct and demeanor while testifying; their interest, if any, or want of interest, if any, in the result of this lawsuit; and the probability or improbability of the truth of their several statements in view of all the other evidence and all the other facts and circumstances. It is from these and all the facts and circumstances in evidence that you will determine the weight or preponderance of the evidence.

It is your sole and exclusive function and duty, as it is your responsibility, to determine the facts that have been established by the evidence. And it is especially your province to determine the credibility of the witnesses and the weight to be given to their testimony.

* * * * *

356 Mr. Arth: I renewed the exception to the Court's refusal to strike the testimony of Mr. Colbert.

I also take an exception to the Court's refusal to grant the specific instructions for the defendant that the Court has refused.

* * * * *

BRIEF AND APPENDIX FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

—
No. 8357

FILED JAN 29 1943

—
Joseph W. Starnes

JOHN T. HENKEL, *Appellant*

v.

JOHN E. VARNER, *Appellee*

—
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8357

JOHN T. HENKEL, *Appellant*

v.

JOHN E. VARNER, *Appellee*

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

Counterstatement of Case.

In appellant's statement of the case, he recites principally the testimony given on behalf of the defendant in the trial court.

The plaintiff's case, in substance, was that he and his wife were tenants in the defendant's apartment for a considerable period of time before the accident. His lease provided that he was only required to make repairs due to his negligence. Approximately two weeks before the accident both plaintiff and his wife reported a leak in the bathtub spigot. Because it was not repaired, reports and complaints were made again. On Saturday evening, Oc-

tober 21, 1939, the janitor, acting on instructions from the manager of the building, repaired the spigot, thereby stopping the leak.

The hot water handle of the bathroom spigot had a crack in it and this condition had existed for about a year (Appellant's App. 22, 23). The janitor had repaired these spigots many times before (Appellant's App. 18, 19). The plaintiff was actually in the bathroom during part of the time that the janitor was doing the repair work (Appellee's App. 16).

After the repair to the spigots on Saturday evening, no one used or attempted to use them until the next morning, when the plaintiff, desiring to take a bath, turned the handle of the cold water spigot. It worked in the customary way. He then attempted to turn the handle of the hot water spigot, using ordinary pressure that one uses for such purposes. The handle, however, would not move, but broke, leaving a sharp porcelain edge on the part that remained with the handle proper, which cut the tendon of the ring finger of the plaintiff's hand.

The plaintiff offered evidence from two registered plumbers that the repair to the spigot was defective and improper.

Summary of Argument.

I. THE PLAINTIFF MADE OUT A CASE TO BE SUBMITTED TO THE JURY.

- (A) The testimony of the plaintiff and his witnesses proved negligent repair.
- (B) The appellant's answer admitted the repair of the spigot and he is therefore barred to deny the same.

(C) Landlord's duty to keep premises in reasonably safe condition and not to repair in negligent manner.

(D) Law applicable to submitting case to jury.

II. THE HYPOTHETICAL QUESTION WAS PROPER.

(A) Other expert witnesses testified in answer to substantially the same hypothetical question without objection; therefore, under no circumstances could there be error.

III. REFERENCE TO INSURANCE WAS NOT PREJUDICIAL.

(A) There was no objection made at the trial.

IV. THE VERDICT WAS SUPPORTED BY SUBSTANTIAL PROOF AND THE JURY WAS NOT IMPROPERLY INFLUENCED. THE COURT THEREFORE WAS CORRECT IN REFUSING TO SET ASIDE THE VERDICT AND JUDGMENT OR GRANT A NEW TRIAL.

ARGUMENT.

I. The plaintiff made out a case to be submitted to the jury.

(A) The testimony of the plaintiff and his witnesses proved negligent repair.

The evidence of the plaintiff and his wife was that the repair to the spigot was made on Saturday, October 21, 1939, and that no one used or attempted to use the bathtub spigots until the next morning when plaintiff was injured. The defendant admits making a repair on Friday, October 20, 1939. Mrs. Varner's testimony was that the janitor was in the bathroom at least a half hour repairing the spig-

ots (Appellant's App. 19). That immediately after the injury to her husband's hand, she observed that the handle of the hot water faucet was broken and it was in such a position that it had not been turned on (Appellant's App. 21). That the handle of the hot water spigot would be in a perpendicular position and when one wished to turn the water on, the handle would be turned down (Appellant's App. 22). That the hot water handle had had a crack in it for at least a year (Appellant's App. 23). On cross examination the following question and answer was given:

"Q. Were you in the bathroom while he was removing the washer? A. No. I was in there with him, but I didn't stay." (Appellant's App. 23).

The defendant's counsel assumed in his entire testimony that the janitor had put a washer on the spigot (Appellant's App. 23, 24, 27).

The plaintiff, Mr. Varner, testified:

"A. So I turned on the cold water. And I reached over *to turn* on the hot water. When I did, why, it broke in my hand." (Appellant's App. 37.)

That the handle was easy to reach and would be in a perpendicular position when the water was off (Appellant's App. 38). He further testified regarding the turning on of the handle of the hot water spigot as follows:

"A. Then I got hold of the hot water, and I was turning it, and it broke, and that is all I know.

Q. Did the water come on? A. No, sir. * * *

Q. Did you shut off the cold water and then turn on the hot water? A. No. It was still running. I knew I hadn't turned on the hot. I started to turn on the hot, and the handle broke in my hand." (Appellant's App. 39.)

At the bottom of the page in appellant's app. 39 and the top of page 40, we find the following:

"Q. When you turned on this hot spigot and that broke in your hand, did you turn that on in the same

manner and way that you turned on the cold water spigot? A. *It did not turn on. It broke in my hand.*

Q. When you attempted to turn that on, did you use the same pressure? A. The same thing.

Q. Did you use ordinary pressure that one would use to turn on a spigot? A. The same as I always used. Just grabbed hold of the spigot and turned it on, sir."

The witness identified the handle of the spigot that he attempted to turn on that morning (Appellant's App. 40), and the handle was received in evidence.

He further testified that when he returned home about five o'clock, Branham was working on the *spigots* of the tub (Appellant's App. 41). That at least a week before the accident he told Mrs. Gregory, the manager, "about the *spigots* being dripping or needing fixing," and both faucets had leaked a number of times before (Appellant's App. 42). That the spigots would be fixed by putting in faucet rubbers to prevent the leak (Appellant's App. 42). That on the occasion of the repair the night before the accident the spigots were leaking (Appellant's App. 42). That the manager, Mrs. Gregory, was told about the spigots and "she said they were going to put new spigots and faucets over the whole apartment" (Appellant's App. 43).

The plaintiff actually was in the bathroom part of the time when the janitor was repairing the spigot. His testimony, in response to appellant's counsel's question, was on cross-examination as follows:

"Q. About putting *washers* on there. Did you see Branham (defendant's janitor) in there on Saturday?

A. I certainly did.

Q. What time? A. It was between 5 and 6.

Q. Isn't it a fact that on the day on which Branham fixed those *washers* you told your wife, or your wife told you when you came in that evening, that Branham had been there and put the *washers* on? A.

No. She didn't no such. She did not say nothing about Branham being there. When I came home, my wife was in the kitchen cooking, and Branham was in the bathroom and I went in and asked Branham why didn't he come up and help me, as he promised to." (Appellee's App. 16).

The testimony of the registered plumbers, Colbert and Barrett, clearly shows that the spigot was defectively repaired. If it had not been defectively repaired, the handle would have turned, causing the valve to open and permitting the water to flow. A natural inference, if not almost a demonstration, from the evidence is that the washer or some other part of the mechanism of the spigot was screwed too tightly or in an improper manner, thereby not permitting the handle of the spigot to turn under ordinary pressure, but causing the handle to break, thus causing the serious and painful injury to the plaintiff. The testimony of the witnesses Colbert and Barrett is reviewed under Argument II and the Court's attention is invited to their testimony.

The defendant produced a witness Rhodes who, although not a registered plumber, was a journeyman plumber. He actually repaired the spigots on the bathtub in question, according to his testimony, the day after the accident. He testified:

"A. I reground the *spigots* and put new *washers* in." (Appellant's App. 108.)

He further testified on the same page:

"A. Reground the *spigots* and put new *washers* in."

The following questions and answers appear on the same page:

"Q. And put a new washer in? A. That is right. Two new washers.

Q. Two new washers? A. The hot and cold.

Q. All right. What else? A. Put new hot water handle on bathtub.

Q. Where did you get the handle? A. The manager of the apartment gave me the handle."

Any possible doubt on the case was completely dispelled by the defendant's own witness. All of the plumbers testified that a washer should not be placed in a spigot that needs to be reground or have the valve reground or re-seated. There was, therefore, definite proof, coming from the defendant, that the spigots did need to be reground and were reground the day after the accident. Not only that, but new washers were placed in the spigots. The witness Rhodes further testified that regrinding of the spigot means the same as to grind the seat of the valve (Appellant's App. 108).

No complaint can be made that the jury did not have before it the same kind and type of spigot and handle as was in the plaintiff's apartment, for the defendant produced one as shown by the testimony of the witness Rhodes (Appellant's App. 109).

It is obvious that the janitor repaired the spigot in a defective and negligent manner. This is so irrespective of how the case may be viewed. Otherwise, there would have been no need for the defendant's witness Rhodes to put new washers on and grind the valve of both spigots the day after the accident occurred. The plumbers all agreed that a washer should not be placed in a spigot when the valve needs to be ground. Because of the roughness in the spigot, it is clear that the janitor had to screw the washer so tightly that it caused the handle to become fixed and difficult, if not impossible, to turn, resulting in the handle breaking and injury to the plaintiff. Defendant's wit-

ness Branham testified that when he finished repairing the spigot it was still dripping. The defendant's witness Rhodes, the plumber, testified that if the work was done properly it would stop the drip (Appellant's App. 123). This testimony demonstrates that the work was improperly or negligently done. This same witness Rhodes testified that where the seat is corroded it is necessary to turn the washer very hard (Appellant's App. 125). This same witness also agreed that it was possible to turn off the spigot so hard that you could not turn it on without breaking one of the handles (Appellant's App. 116). However, if the spigot were working properly, it should turn easy (Appellant's App. 116).

The defendant's janitor testified as follows concerning the handles:

"Q. When you left there what was the condition of the handles? A. They was all right.

Q. Both of them? A. Yes, sir.

Q. Did the handles work all right when you moved them up and down? A. Yes, sir." (Appellant's App. 83.)

What was the need for the witness Branham to test both handles if he had only done work on one spigot? Irrespective of what he did, it was ineffective because it had to be redone two days later.

This same witness testified that there were two plumbers downstairs at the time he was fixing the washers on the plaintiff's spigots (Appellant's App. 92).

(B). The appellant's Answer admitted the repair of the Spigot and he is therefore barred to deny the same.

The original complaint charged that the defendant permitted "a certain water spigot to become and remain in a defective condition * * *" (Appellant's Appendix 2).

The answer, third defense states (Appellant's Appendix 5):

"Defendant says that at the time and place mentioned in the complaint the *spigot in question was in a reasonably safe condition* and that reasonable care was exercised by the defendant in the maintenance thereof in a safe condition; * * * but such injuries, losses and damages, if any, were caused solely by the negligence and carelessness of the plaintiff in wilfully applying grossly excessive and unnecessary pressure to the valve handle of the said spigot, thereby causing said handle to break." (Italics ours.)

The defendant's fourth defense states (Appellant's Appendix 5):

"Defendant says that the spigot in question was in a reasonably safe condition when said apartment was originally rented to plaintiff; that said spigot was not thereafter changed or altered by defendant, except for the occasional renewal of washers therein;"

The amendment to the complaint charged the defendant

"repaired and adjusted a water spigot * * * and the said repairing, adjusting and work done upon the aforesaid spigot was done in a negligent, careless, and improper manner." (Appellant's App. 6).

The answer to the amended complaint states (Appellant's App. 7):

"The Defendant admits that on to wit, October 19, 1939, he through his agent, servant and employee replaced a washer on one of the spigots in the bath room of apartment number 4, 133 Webster Street, Northwest, Washington, D. C."

In view of the foregoing it is contended that appellant is barred from raising the question that the spigot causing the injury was not the one upon which the washer was placed. Pleadings, whether they be complaints or answers, are required to state true facts, and appellant has

certainly, inferentially, if not directly, admitted that the spigot that caused the injury was repaired.

A case directly in point on this question is *Altemus, et al. v. Talmidge*, 61 App. D. C. 148, 58 Fed. (2d) 874. The plaintiff in that case had been injured due to a defect in the sidewalk partly under the control of the defendant Altemus. In his plea he had stated that he had used due care in the maintenance of the property, including the sidewalk.

At the trial of the case, however, he contended that his tenant and not he, as owner, was responsible for the reason that the entire building had been leased to one tenant. However, this Court in sustaining the trial Court said:

“But this assignment should be denied on another ground. Law rule 23 in force in Washington abolished the plea of the general issue, and requires every pleading to set forth the true facts upon which the pleader relies. In response to this rule, Altemus filed several pleas in which he admitted maintaining the property where the injury occurred as a sidewalk, and defended on the ground that he had used due and proper care to keep it reasonably safe for travel by pedestrians. *This admission, in our opinion, forecloses the right of appellant now to claim that he had no responsibility with relation to the sidewalk at the point in question.* (Italics ours.) To permit a party to plead a certain definite state of facts and then afterwards to deny them to the injury of the party relying on them is contrary to settled principles of law. ‘Undoubtedly a litigant has no cause for complaint if the court accepts his solemn and sworn admissions in pleadings and testimony as true.’ *Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.* (C. C. A.) 253 F. 914, 917; and he has as little right to complain where his opponent, relying upon his sworn pleadings, offers no evidence to controvert the facts alleged therein. In *Central Railroad of New Jersey v. Stoermer* (C. C. A.) 51 F. 518, the defendant admitted in its pleadings that at the time of the injury alleged it was operating a railroad at the point or place where the plaintiff was injured. In the proof it was shown that the railroad

was operated by receivers. The Court of Appeals held that the plaintiff, because of the plea, was not required to prove that the railroad was operated by itself, and for the same reason that defendant could not prove that it was operated by some one else.

"Here the plaintiff relied on the admissions in defendant's plea, and has, as a result of the statute of limitations, lost any right he may have had to recover against the tenant. In these circumstances, it would be subversive of all right to permit defendant to change his position."

(C). *Landlord's duty (a) to keep in reasonably safe condition and (b) not to repair in negligent manner.*

Cases consistently hold that if a landlord undertakes to repair and does so negligently he is liable. This is true irrespective of whether the premises are under a lease agreement or not and irrespective of whether the lease provides that the landlord or tenant shall make repairs.

Some courts have not limited the question of liability of the landlord to those cases of negligent repair, but have taken a broader and more liberal view of the question and held the landlord responsible for defective equipment or premises, irrespective of repair.

Thus, in the case of *Maday et ux v. New Jersey Title Guaranty & Trust Company*, 127 N. J. L. 426, 23 A(2d) 178, the Supreme Court of New Jersey sustained a verdict against the landlord where he had promised to fix the ceiling but failed to do so. Later the ceiling fell and injured the tenant. The Court sustained the recovery.

In *Rice v. McPherson*, 308 Mass. 599, 36 N. E. (2d) 375, the Supreme Judicial Court of Massachusetts held that there was liability in the case for injuries to the tenant's daughter caused by wear due to general conditions on the

tread of one of the steps, so that it had become loose, causing it to tip. The Court said:

“Upon this evidence the jury could find that the defendant did not use good care to keep the stairway in as good as condition as it was when the tenancy began.”

A Federal case somewhat in point is *Moore v. Steljes*, 69 Fed. 518. There a complaint was filed for injuries sustained by the lessee's child due to a falling ceiling. The case discusses both the question of a warranty of safety and sufficiency as well as negligence. The District Court in overruling a demurrer held that the complaint stated a cause of action. The complaint did not charge a repair, but apparently charged that the ceiling was permitted to become in such a negligent condition that it fell.

In the case of *Gill v. Middleton*, 105 Mass. 477, it appears from the facts that the defendant, although not obligated to do so, repaired part of the premises. The plaintiff testified that he told her that they were safe to use. The plaintiff was injured when using that part of the premises which was repaired and it was held that it was a question of fact for the jury whether the repairs were negligently made.

The case of *Wardman vs. Hanlon*, 52 App. D. C. 14, is one wherein a tenant was injured through the negligence of the landlord properly to maintain plumbing facilities in the bathroom of an apartment. In the Wardman case, as in this case, the landlord had control over the water system in the building. In this case, the landlord, through his agents, had made repairs to the bathroom spigots on other occasions. Admittedly, the repairs were done a very short time before the injury occurred. At the bottom of page 17, in the Wardman case, the Court quoted from an Illinois case which held that a landlord who rents different

parts of a building to various tenants and retains control over the stairways, etc., has an implied duty to keep such places reasonably safe and is liable for injuries. This Court immediately following the quotation states:

“This states the law correctly, and by a parity or reasoning is as applicable to a landlord who retains conclusive control of the supply of water for toilet purposes as to one who has control of the things mentioned in the question.”

In the Wardman case, it was seriously contended that there was insufficient evidence to submit to the jury. Both the trial court and the appellate court took a different view and held that it was a case which should have been submitted to the jury and the jury's verdict was sustained.

The Wardman case held that the nature in which the accident occurred was sufficient to authorize a presumption of negligence warranting a verdict. It is submitted that the same would be true in this case and the Court need not pass on this point for the reason that there was ample evidence, which in a sense was corroborated by the defendant's witness, that it would be improper and defective to repair a spigot in such a way as to cause undue pressure to be put on the handle of the said spigot before it would turn on the water.

It is submitted that the testimony of the witness Colbert and of the Plumbing Inspector Barrett, was more than ample to show the negligent repair of the spigot.

The cases in which injury occurred in relation to a building and where this Court held the case was properly submitted to the jury on the question of negligence and contributory negligence are the following:

Young Men's Shop v. Odendhal, 73 App. D. C. 354,
at pages 355, 356, 121 F. 2d 857.

Carusi v. Schulmerick, 69 App. D. C. 76, 98 F. 2d
605.

In this last mentioned case the Court, at page 79, said that even though the question may be a close one, it should be submitted to the jury. (Italics ours.)

(NEGLIGENT REPAIR)

The cases holding that where the landlord makes repairs in leased premises, either gratuitously or otherwise, and does so negligently, such negligence is actionable and warrants a verdict for the plaintiff are the following:

Bloecher v. Duerbeck, (Mo. Sup. Ct., 1933), 333 Mo. 359, 62 S. W. (2d) 553. In that case, the Court said:

“While a landlord, in the absence of a contract to do so, is under no obligation to his tenant to make repairs or improvements on the demised premises, yet, if he voluntarily does so for his own or for the common advantage of both him and the tenant, he must use reasonable care in doing so, and is liable for any injury caused by his negligence. *Finer v. Nichols*, 175 Mo. App. 525, 535, 157 S. W. 1023; *Patton v. Eveker*, (Mo. App.) 232 S. W. 762.

“In *Shaw v. Butterworth*, 327 Mo. 622, 38 S. W. (2d) 57, 60, this court said: ‘An exception or extension to the rule (of non-liability of a landlord) obtains, however, to the effect that a landlord, undertaking to make repairs upon the demised premises, is liable upon making such repairs for an injury caused by his negligence or that of his servant. And he is liable notwithstanding the repairs were made gratuitously or without obligation. Nor is his liability limited to the tenant personally, but comprehends all persons, such as the tenant’s family, servants, and guests, using the premises pursuant to the contract of letting. * * * Within this exception to the rule is the negligent construction of improvements on the demised premises by the landlord. 36 C. J. 218; *Klonowski v. Mfg. Co.*, 217 Ill. App. 150; *Mortrude v. Martin*, 185 Iowa 1319, 172 N. W. 17.’ ”

In *Robinson v. Heil* (1916) 128 Md. 645, 98 Atl. 195, it appeared that the injury complained of was due to defec-

tive stairs, and that these stairs were in a defective and dangerous condition at the time the property was leased and that the landlord knew of this condition, his attention having been called to it by a prior tenant. The lessor agreed to repair the stairs and told the tenant to use them until he could make the repairs. Under these circumstances, it was held that the landlord was liable if he negligently failed to make the repairs, and that this was a question of fact for the jury.

In the case of *Harris v. Lewiston Trust Company*, (Sup. Ct. Pa. 1937), 326 Pa. 145, 191 A. 34, the Court held that there can be no doubt that a landlord undertaking to repair the leased premises, and repairing them negligently, thereby causing injury, is liable for his tort. Citing many cases.

This entire subject is discussed in the recent publication, *32 Am. Juris*, at pages 547-552, and holds the landlord responsible where repairs are negligently made by him.

The Supreme Judicial Court of Massachusetts in the case of *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96, passed specifically on the question of the liability of a landlord who undertakes to repair and held that where the repairs were undertaken and done negligently, which was a question of fact for the jury, the plaintiff was entitled to recover.

In *O'Hanlon vs. Grubb*, 38 App. D. C. 251, the Court of Appeals sustained liability of the apartment house owner. At the very outset of the case, the Court said:

"The tenancy here relates to an apartment house,—a class of tenancy of comparatively recent origin, and one which, in some respects, at least, is to be distinguished from other classes."

In this case, this Court held the apartment house owner responsible for the failure to make repairs to a heating

system which caused a property damage to the tenant occupying the apartment. In the case at bar, it is clear that the defendant exercised control over the repairs and did make actual repairs on all occasions. The language of the Court in the O'Hanlon case, at the bottom of page 258, and the top of page 259 is in point. Here, the Court holds that there is liability for negligent repair and in some cases even for negligent failure to repair.

(D) *Law Applicable to Submitting Case to Jury*

This Court in *Christie, et al. v. Callahan*, 70 W. L. R. 210, discusses, in detail, the question of the duty of the Court to submit or refrain from submitting a case to the jury. The Court during the course of its opinion said:

"The danger to be guarded against is a too obvious and gross miscarriage of justice, a departure too far from established lines of liability. Facts are primarily within the jury's function. Hence it must be given wide latitude or trial by jury becomes trial by court. * * * This really means weighing it factually, not for conviction, but for doubt as to the outcome. The verdict sustained therefore represents the jurors' conviction that it is right, and the judge's that it may be right."

It was contended in the *Christie* case, *supra*, that direct and positive testimony must be adduced as to the specific acts of negligence. This Court said:

"A burden so heavy is not required either by the general law of negligence or by the Sweeney case. (*Sweeney v. Erving*, 35 App. D. C. 57, affirmed 228 U. S. 233). Generally speaking, direct and positive testimony to specific acts of negligence is not required to establish it. Circumstantial evidence is sufficient, either alone or in combination with direct evidence. Circumstantial evidence may contradict and overcome direct and positive testimony. The limitation on its use is that the inferences drawn must be reasonable. But there is no requirement that the circumstances, to justify the inferences sought, negative every other

positive or possible conclusion. The law is not so exacting that it requires proof of negligence or causation by testimony so clear that it excludes every other speculative theory."

The Court concludes its opinion in the *Christie* case, *supra*, as follows:

"Unfortunately, the case is one in which, as it comes to us, it is necessary to hold that the jury was justified in ignoring important and, in some respects, undisputed testimony. That would have been true, whatever its verdict. None could have been rendered which would not have ignored important, convincing and crucial evidence, given, as we think, by honest and honorable witnesses. It is in just such cases that courts are required to keep hands off the jury's business. We must do so here."

Negligence and contributory negligence are generally questions for the jury. "The law's emphasis ordinarily is on liability, not immunity for wrong doing." *President and Directors of Georgetown College v. Hughes*, 70 W. L. R. 918.

Even though the evidence should strongly preponderate against appellant, nevertheless this court has said the question should be submitted to the jury. *Bell vs. Brown*, 70 W. L. R. 884.

Gunning v. Cooley, 281 U. S. 91; 74 L. ed. 720. This probably is the most cited case on the question of when a case should be submitted to the jury. The suit in that case was one for personal injuries caused by the negligence of a physician in dropping acid rather than oil in the plaintiff's ear.

The rule declared in that case was:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of

either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 606, 36 L. ed. 829, 833, 12 Sup. Ct. Rep. 905; *Gardner v. Michigan C. R. Co.*, 150 U. S. 349, 360, 37 L. ed. 1107, 1110, 14 Sup. Ct. Rep. 140; *Baltimore & O. R. Co. v. Groeger*, 266 U. S. 521, 524, 527, 69 L. ed. 419, 422, 423, 45 Sup. Ct. Rep. 169. When uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 45, 37 L. ed. 642, 643, 13 Sup. Ct. Rep. 748, 7 Am. Neg. Cas. 369."

The defendant denied that he ever put acid in her ear and testified there was none in his office. The opinion then states:

"The evidence shows that, while difficult to do, it would be possible by means of a dropper to apply acid to eardrums without allowing it to come into contact with other tissues. There was no scar or anything to indicate that acid had touched any part of the canal leading to either eardrum. Plainly it would have been impossible for defendant to have closed the external ears without allowing the liquid used for that purpose to touch the canal tissue. *But plaintiff was not required specifically to show what defendant did put in her ear or that the treatment destroyed either of her eardrums or made her deaf.* If the evidence was sufficient to justify a finding that defendant negligently put a harmful fluid in her ears causing her pain and injury, the motion was properly denied." (Italics ours.)

"As the credibility of witnesses and the weight to be given to their testimony are for the jury, plaintiff's testimony as to the treatment and immediate effect upon her and the testimony of others as to her condition shortly afterwards constituted sufficient evi-

dence to warrant a finding that, instead of oil, defendant negligently put some harmful liquid into her ears, thereby causing her pain, suffering and some injury in and about her ears. It was not necessary for the trial court in passing upon the motion to determine, and we need not consider, whether under the rules laid down in the decision of this court the evidence was sufficient to warrant a finding that the perforation of either eardrum or permanent deafness resulted from defendant's treatment."

The defendant in this case contended that nothing was done to the hot water spigot. The janitor, however, admits repairing the cold water spigot and the testimony of the plaintiff and his wife was to the effect that the "spigots" were repaired. This constitutes a question of fact which the court was completely justified in submitting to the jury.

The testimony of Dr. Gunning that he did not use acid and there was no acid in his office cannot control the question any more than can the statement of the janitor that he repaired only the cold water spigot.

A most significant fact is that the plumber, when called in to make the necessary repairs, a day or two after the accident, ground the seat of both the hot and cold water spigots which shows that the repair by the janitor was defective.

The case of *Jacobs v. City of New York*, 315 U. S. 752, 86 L. ed. 1166, (decided March 30, 1942), is very helpful in determining when a case should be submitted to the jury. The plaintiff in the Jacobs case sued under the Jones Act (41 Stat. at L. 988, 48 U. S. C. Sec. 688), which imposes liability in personal injury cases for defects in equipment due to negligence. The Circuit Court of Appeals held the evidence was insufficient to submit the case

to the jury. The Supreme Court of the United States in reversing the case said:

“We think these facts entitled petitioner to have the jury consider whether his injury was caused by any ‘defect or insufficiency, due to its (respondent’s) negligence, in its appliances.’ That is to say, it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner’s work, whether respondent’s failure, although it had at least two days’ and possibly three weeks’ notice of the defect, to supply petitioner with a new wrench amounted to negligence on its part, and whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use. Cf. *Socony-Vacuum Oil Co. v. Smith*, *supra* (305 U. S. 424, 83 L. ed. 265, 59 S. Ct. 262). Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury.”

In the case of *Boaze v. Handy, Inc.*, 70 App. D. C. 24, 102 F. (2) 628, the Court of Appeals in reversing a decision of the trial court for granting a directed verdict, held that the evidence should be construed most favorably to the plaintiff and was sufficient to warrant a finding by the jury. The Court said:

“On such a motion, in order to determine whether there is evidence upon which a jury can properly find a verdict, the Court must assume that the evidence proves all that it reasonably may be found sufficient to establish. If fair minded men may honestly draw different conclusions as to the existence or non-existence of the negligence charged, the question is not one of law but of fact to be settled by the jury. Citing *Gunning v. Cooley*, 281 U. S. 90-94.”

In *McWilliams v. Schekard*, 70 W. L. R. 543, this Court held that if by reason of a conflict in the testimony there is

uncertainty as to the existence of negligence, the question is one to be settled by the jury (*italics ours*).

II. The hypothetical question was proper.

The mere fact that the hypothetical question had additions when counsel interposed an objection does not make it incoherent or confusing. The question, as originally put, (Appellant's App. 64, 65) was proper. The trial court erroneously thought that the question contained the assumption that the "handle was repaired" (Appellant's App. 65). The question did not state this, but that part of the question stating that the spigot itself or the mechanism of the spigot was repaired was restated to the witness (Appellant's App. 66). Defendant again interposed a general objection. After the assumption of an additional fact suggested by the court (Appellant's App. 66), the defendant's counsel objected on the ground that it would be speculation. The witness answered "that the spigot was repaired in a defective manner, because the spigot should have opened even though the handle did break, otherwise it should open easy at the time." (Appellant's App. 67.) This witness had thirty-one years' experience in the plumbing business and was a registered plumber.

The appellant's counsel, in page 11 of his brief, complains that no "spigot" was shown to the witness. However, he failed to state that this was corrected immediately and the exhibit was referred to as "this handle." (Appellant's brief 10.) The two broken pieces of the porcelain handle had been identified as the handle from the spigot from the bathroom and this was never denied. It was unnecessary for the witness Colbert to have personal

knowledge of the fixture in question, as all the registered plumbers who appeared as witnesses in the case testified that leaks in spigots were stopped in many instances by installing a washer.

From the testimony of the witness Colbert (Appellant's App. 64-69) and that of the witness Barrett (Appellee's App. 27-34), this Court can understand that the handle, which is attached to a water spigot or faucet, is used to cause the water to come on or go off. The spigot to which the handle is attached, and may in some instances be considered a part, contains certain valves and washers. The witnesses for both sides agree that washers are used to stop a leak. However, washers may be installed improperly. The testimony of the witness Colbert was that the spigot was repaired in a defective manner, because the handle of the spigot should have turned under ordinary pressure that one uses to turn the handle of a spigot.

All of the facts in the hypothetical question were in evidence. However, it is not necessary to have every fact in evidence presented to a witness before he answers a hypothetical question. The Court in its charge to the jury respecting the hypothetical question said (Appellant's App. 137):

"You should consider this kind of testimony along with the rest of the testimony in the case; but you are reminded that its value and weight depend upon whether the evidence shows that the assumed or supposed facts have been established. Obviously, if such facts have not been established by the evidence, then the opinion is weakened to the extent at least that it is based on facts which the evidence does not establish. The jury is the sole judge of the weight to be given to this evidence."

Appellant's counsel, in his brief at page 12, erroneously states that the question required the assumption that the

janitor had worked on the portion of the fixture upon which the plaintiff was injured. The question did not assume this fact, but stated that the spigot was leaking, that there was a drip in the tub, and that the janitor of the building came to repair it and did something to the spigot which stopped the leak. The plaintiff's case showed these facts.

From the testimony of the witness Rhodes (Appellant's App. 106-126) and later (Appellant's App. 127, 128), as well as the plaintiff's witnesses, Colbert and Barrett, it is clear that the washer is placed in some part of the spigot proper and that the turning of a handle causes an opening in the spigot so that water comes from the pipes. It is further undisputed that a washer is ineffective where the valve of the spigot is worn or scored (Appellee's App. 29-32).

All the witnesses agree that the valves should be re-ground where the washer does not effectively stop the leak. That was actually done in this case after the injury and after the defective repairing of the janitor (Appellant's App. 108).

It is submitted that the question to, and answer of, the witness Colbert did not in any wise invade the province of the jury, but was merely evidence tending to establish the plaintiff's claim that the spigot had been negligently repaired. Certainly the subject matter of the testimony was one with which the ordinary juror would not be familiar. With Government clerks and women being eligible for jury duty, it cannot be assumed that they would have full knowledge of the mechanism of a spigot as well as the methods used to repair the same.

This Court in the case of *Gunning v. Cooley*, 58 App. D. C. 304, 30 Fed. (2d) 467, at page 306, held that an expert witness could answer a hypothetical question which was based

on both personal knowledge of the witness acquired by personal examination and upon assumptions such as were supported by evidence already introduced in behalf of the plaintiff.

In *Horton v. United States*, 15 D. C. App. 310, this Court discusses the rule of the Trial Court to follow in deciding the answers to hypothetical questions. It is true the *Horton* case was a criminal one, but it would seem that the rule is no different in civil cases from that in criminal cases. At page 325 the Court said:

“Questions of this nature (hypothetical) must be fairly framed with reference to the facts that have been offered and relied on in the evidence, and the hypothesis must be clearly and distinctly presented, so that there may be no misunderstanding by the witness and no confusion in the minds of the jury. Beyond this it would seem impracticable to frame a general rule applicable alike to all cases.”

This Court said the Trial Court should consider the facts and circumstances in a given case and held that a hypothetical question for an expert may be framed either upon all of the facts in the case or upon any part of the facts assumed to be true.

At page 327 the Court said:

“The numerous decisions upon questions of this character demonstrate the propriety of leaving the *scope and limitation* of hypothetical questions, *that must depend largely upon the special circumstances of each case, in a very great degree, to the discretion of the Trial Court.*” (Italics ours.)

Courts have taken a liberal viewpoint to the admissibility of hypothetical questions and answers. Thus, in the case of *Jackson et ux. v. United States Pipe Line Company*, 325 Pa. 436, 191 A. 165, the Supreme Court of Pennsylvania, speaking through its Chief Justice, said that an expert witness

could answer questions where his knowledge of the facts were observed personally by him or where the facts were stated to him supported by the evidence or they may be based on personal observation combined with assumed facts appearing in the evidence. The expert witness in the *Jackson* case testified as to the necessity of drilling certain wells at certain points.

The Supreme Court of the United States in *Forsyth v. Doolittle*, 120 U. S. 73, 30 L. ed. 586, held that the questions as to the length of hypothetical statements and the extent to which an examination of a witness may be allowed must be in a great degree left in the discretion of the Court.

In *Lucier v. Norcross*, 37 N. E. (2d) 498, ... Mass., (October 31, 1941), the Supreme Judicial Court of Massachusetts specifically held that the distance at which automobile lights turned on at low beam would pick up an object the size of an ordinary man was the proper subject of expert testimony. The Court said:

“This was a matter about which an expert might be expected to possess more accurate information than the ordinary jurymen and was therefore a proper subject for expert testimony.”

In *King v. Davis, agent*, 54 App. D. C. 239, 296 Fed. 986, this Court held that the action of the Trial Court in failing to permit an expert witness to testify was error. The plaintiff's case was based on the serving of tainted meat. The witness, a food inspector, was asked if it would have been reasonably easy to ascertain by one experienced in the business of serving food and meat, whether or not this particular meat at the time it was served was in a fresh or tainted condition. The objection was on the ground that the witness was not qualified and besides that it was something that the jury knew as much about as the witness. The Court

sustained the objection. This Court reversed holding that the witness was competent to testify and said:

“We recognize the rule that expert testimony is permissible only where the thing to which it relates is so far removed from ordinary experience that a jury will presumably not possess the skill or knowledge requisite to draw a proper inference from the facts, even if such facts could be ascertained (citation). *Whether or not the matter in the instant case was one proper for expert testimony is a close question, but we believe it would have been better to have received the testimony.*” (Italics ours.)

One of the most recent cases of this Court dealing with the scope of a hypothetical question, as well as the qualifications of a witness to answer such a question, is *District of Columbia v. Chessin*, 61 App. D. C. 260; 61 F. (2d) 523. The expert witness in that case was testifying to the construction of a roadway and that it was dangerously and negligently constructed, which was the entire basis of the action. This Court at page 262 said:

“The first eight assignments are based on errors which, it is claimed, resulted in permitting plaintiff’s witness, Anderson, to testify as an expert, and particularly to express opinions in relation to the *dangerous character of the construction of the highway and the effect on the occupants of an automobile in the use of the highway at the point in question.*” (Italics ours.)

The Court, after detailing the witness’s qualifications, stated:

“We think this was quite enough to qualify the witness to testify as an expert. Ordinarily the qualification of an expert witness, that is to say, his knowledge, skill, and experience, to express an opinion on a particular matter in issue is a question for the Trial Court, and the exercise of this discretion will not ordinarily be disturbed by an appellate court (citing cases). We think the discretion exercised by the Trial Court in this instance was not erroneous.”

(A) *Other expert witnesses testified in answer to substantially the same hypothetical question without objection; therefore, under no circumstances could there be error.*

Appellant's counsel further complains in his brief, at page 13, as to the further testimony of the witness Colbert relative to the manner in which a leaking spigot is repaired. It is submitted that this was proper; however, there was no objection interposed to this line of testimony.

Without objection, the witness Barrett, an experienced registered plumber for over thirty years, who at the time of trial had supervision over the planning and plumbing in the Plumbing Inspector's Office of the District of Columbia Government, testified, after examining the handle of the spigot, that it had been cracked for some time prior to the time it was broken, because there was discoloration from water and dirt (Appellee's App. 28). He further testified that whenever a faucet is repaired it should be examined at first to see whether the seat is in proper condition. If the seat is scored or chipped in any way, it should be ground before a new washer is put on it (Appellee's App. 29). This is done because if the washer is placed on a faucet where the seat is not in proper condition and after it is turned a few times a rough seat would grind that out no matter how tightly you turned it down and your washer would be of no use. He also testified that if the seat was in proper condition and the washer was put on it would stop the leak. That there is a grinder that comes for the purpose of regrinding the valve so that the washer may be properly reseated. A further important fact of his testimony was that where the valve needs regrinding but it is not done and only a washer is put in the spigot to stop the leak, it has to be turned down very hard (Appellee's App. 29-30). Where

the washer is put on in a spigot where the seat should have been reground, but was not, it is necessary to turn the part of the spigot harder so that the washer will get down on the unground seat (Appellee's App. 32). A plumber is the only competent person to regrind the seat on the valve of a spigot (Appellee's App. 33). That a janitor without plumbing experience cannot tell whether a valve needs reseating or not, but a plumber not only could tell but could reseal a valve quickly (Appellee's App. 33).

This witness further testified in answer to substantially the same hypothetical question that was propounded to the witness Colbert that, if a washer is screwed in very tightly and the valve should have been reseated, but was not, that would naturally make it hard to turn on the handle as well as to turn it off, because using force to close anything is going to require force to open it again. That if he said the contrary in his previous testimony he was in error. (Appellant's App. 129).

Under these circumstances, even if the Court had erred in admitting the witness Colbert's testimony, such a point would be waived by consenting to the admission of similar testimony from other witnesses without objection of any kind.

There was an objection to part of the witness Colbert's testimony; however, the witness Barrett for the plaintiff and the witness Rhodes for the defendant thereafter testified to substantially the same evidence without objection. The defendant thereby waived his right to press his objection to the admission of the evidence from the witness Colbert. *Rodier vs. Life Insurance Company of Virginia*, 32 App. D. C. 159, at page 162.

The defendant's witness Rhodes testified in answer to a hypothetical question which was propounded by the de-

fense counsel. It happened that the jury believed the plaintiff's witnesses (Appellant's App. 116).

If evidence on a point is received in the case without objection, it is not error to receive the same kind of evidence when there is objection. The evidence once being in the case properly, no prejudicial error was committed in refusing to eliminate other answers of the same substance. *Globe Furniture Company vs. Gately*, 51 App. D. C. 367, 368, 369; 279 Fed. 1005.

III. Reference to insurance was not prejudicial.

It is clear from the part of the testimony quoted (Appellant's App. 14) that the plaintiff was referring to his accident insurance. He did not say that the insurance company was the defendant's insurance company, but immediately stated that he was referring to an accident policy that he had. All of the plaintiff's testimony on this point is found in the Appellant's App. 44, 45 and 46.

Appellant's counsel is an experienced hand at trying jury cases. The record bears this out. He was completely satisfied at the time of the trial to have the case proceed. No objection, exception, or motion of any kind was made relative to the statement of the witness concerning insurance. Counsel's statement now, found at the bottom of page 14 of his brief, that the court's statement tended to instill in the minds of the jurors the suggestion that the defendant was insured, is wholly without foundation in the record. If it indicates anything at all, it would indicate that the Court was suggesting to defense counsel that the witness did not indicate that the defendant was insured.

In *Culp v. Repper*, 64 App. D. C. 337, 78 F. (2d) 221, there was a definite attempt to show that the defendant was represented by a liability insurance company and to show that the insurance company could procure absent witnesses.

In *Brooke v. Croson*, 61 App. D. C. 159, 58 F. (2d) 885, the plaintiff was permitted to say that the defendant told him that he, the defendant, "was fully insured." Objection was promptly made, was overruled by the Court, and the evidence was admitted "to be considered by the jury along with the other evidence in the case, to which ruling and action of the Court the defendant by his counsel then and there duly excepted" (page 160).

The jury in the case at bar was not told anything about insurance. The evidence of insurance did not go to the jury to be considered with the other evidence. No argument was made to the jury nor was there any reference to it at any time.

In the case of *Stewart v. Newby*, 266 F. 287 (C. C. A. 4), there also the counsel for the plaintiff called the jury's attention to the fact that the defendant was insured at the opening of the trial and many times during the trial. This was held to be error. Here, again, however, the facts are entirely different from the facts in the case at bar.

Appellant cites the case of *Capital Construction Co. v. Holtzman*, 27 App. D. C. 125. Counsel in that case definitely showed that the defendant was insured. He had the aid and assistance of the trial court. In the case at bar, it was never shown that the defendant had insurance. The plaintiff merely stated that *he* had an accident policy not that the defendant had an accident policy. There was no intimation in the trial of the present case that any insur-

ance company would have to respond in the event of a verdict. In the case of *Capital Construction Co. v. Holtzman, supra*, five pages of the opinion (pages 133-138) are devoted to questions and answers showing the defendant was insured. There is a vast difference between these two cases. Counsel's question would not normally elicit the fact that the bill had been sent to an insurance company. The witness stated this himself. The matter was not followed further, except in the hearing of the jury, the witness said it was *his* accident policy. Such testimony does not in any way tend to establish that the defendant is insured, or that an insurance company is back of the case and defending the same and will be required to pay any judgment that may be rendered.

Insurance companies are not entitled to any preferential rights. Everyone knows that there is a law which requires taxicabs to carry compulsory insurance in the District of Columbia. They are required to carry a sticker on the windshield showing that they have complied with the law. Many states require compulsory insurance for all types of vehicles. The New Federal Rules of Civil Procedure (Rule 17) requires that every action shall be prosecuted in the name of the real party in interest. It may well be a question as to whether or not it would not be permissible for an individual to sue an insurance company along with the defendant, or alone, as it is the real party in interest.

In this case, however, it is submitted that the error, if any, was harmless and no prejudice occurred nor was there any tendency to a prejudice against the defendant.

(A) *There was no objection made at the trial.*

There was no exception taken to the testimony of the witness regarding the alleged question of insurance. Coun-

sel apparently was of opinion that the evidence was in no way prejudicial. He was willing to proceed with the trial. No objection or motion to strike was made. No motion to withdraw a juror was made. Counsel in no wise indicated to the Court that he was not satisfied to proceed with the case.

As this Court said in *Globe Furniture Company v. Gately* 51, App. D. C. 367, 279 Fed. 1005, "error cannot be predicated on the action of the court in admitting testimony where no exception has been reserved."

Under the new rules of Civil Procedure, of course, no exception is necessary today, but there was no objection in this case. If counsel believed error was occurring, the Court's attention should have been called to it at that time. He cannot stand by and wait for the jury to try the case, and then, if it is adverse, raise the question for the first time.

Even in a murder case, the Supreme Court of the United States has held that objection must be timely interposed.

Thus, in *Queenan v. Oklahoma*, 190 U. S. 548, 47 L. ed. 1175, the Court said:

"He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights."

In *Allis v. United States*, 155 U. S. 117, 39 L. ed. 91, the Court dealt with the necessity for calling to the Trial Court's attention any alleged error. The Court stated:

"A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions."

This Court in two cases held that even in a criminal case it was necessary to take an exception. Thus, in *Yeager vs. United States*, 16 App. D. C. 356, at page 362, the Court said:

"The defendant took no exception. The Justice having done all that he was called upon to do, there was no ground for an exception to his action. He could not, of his own motion, withdraw a juror and continue the case for trial before another jury without affording the defendant, probably, good foundation for a plea of former jeopardy. The defendant made no such motion. If, as has been stated, he contemplated a motion of that, or any other nature, founded in the incident, he abandoned the idea and proceeded with trial. Having thus elected to take the chance of a verdict, without motion or exception, it is no foundation for the assignment of error."

See also the case of *Lorenz v. United States*, 24 App. D. C. 337. The Court at pages 390-391 discusses the improper argument made by the District Attorney. However, there was no motion made to withdraw a juror; and as the Court stopped the improper argument, this Court held that the action did not constitute reversible error.

The recent case of this Court of *Williams v. Lewis*, 70 W.L.R. 194, is in point. The plaintiff's counsel had claimed in his opening statement that certain injuries were due to the accident. However, this was not borne out by the medical testimony and the Court struck out all reference to it. In the argument, however, plaintiff's counsel referred, inferentially, that the accident had caused the special injury. No motion was made, however, to withdraw a juror and this Court held that where error is alleged to have occurred due to statements of counsel or offer of proof, objection or motion to withdraw a juror must be made. Otherwise, it was waived.

Title 28, Sec. 391 (Judicial Code, section 269, amended)
U. S. C. A., provides:

“New trial; harmless error. All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (R. S. sec. 726; Mar. 3, 1911, c. 231, sec. 269, 36 Stat. 1163; Feb. 26, 1919, c 48, 40 Stat. 1181.)

IV. The verdict was supported by substantial proof and the jury was not improperly influenced. The Court therefore was correct in refusing to set aside the verdict and judgment or grant a new trial.

The old spigot which was produced by the Court was not objected to by counsel for the defendant. It is true that he stated that he objected to the fixture, at page 89 of Appellant's Appendix, but the witness had answered on the preceding pages many questions concerning this spigot, the handle, and the washer, without objection. What was apparently offered in evidence was a diagram because immediately plaintiff's counsel stated: “I will withdraw this (crumpling up paper on which the witness had drawn.)” (Appellant's App. 89). There were numerous questions asked this and other witnesses concerning the fixture produced by the Court without objection and it is submitted from a fair reading of the record that defendant's counsel did not object to the use of this spigot produced by the Court. Defense Counsel questioned his own witness, Rhodes, about this spigot (Appellant's App. 114-5).

In all events, the defendant produced a spigot which was claimed to be identical with the one in question in the apartment. It was offered and received in evidence without objection.

The size of the verdict alone would not indicate in any way prejudice or "insidious suggestion" of the defendant's insurance. First of all, there was no mention of the defendant's insurance.

The plaintiff sustained substantial injuries. The plaintiff was out of work from October 22, 1939, to the middle of May, 1940. His weekly wages would be anywhere from \$70.00 to \$85.00 and the highest he made was \$147.00 per week. Thus, the plaintiff was out of work for approximately seven months (approximately 30 weeks). It is fair to assume that he would be able to earn anywhere from \$75.00 to \$125.00 per week. If it were taken on the average of \$100.00 per week, his loss of wages alone was \$3,000.00 (Appellant's App. 47, 48, 49). He had undergone three operations. He testified without contradiction that the doctor advised him another operation was necessary. That the injury was very painful at the time of the infliction and that it still pains him some. That he cannot close his hand. That there is very much pain where the adhesion is. That he can't hold the hammer or other carpenter tools as good as he could before (Appellant's App. 50, 51). That he did not remain in the hospital long because his wife is a registered nurse and she could take care of him at home, and he did not want to run up expenses (Appellant's App. 50). The doctors' testimony confirmed the fact that the injury was very painful.

He will be permanently disfigured. The element of embarrassment and humiliation by virtue of the disfigurement could come into play in such a case. The only job

he ever lost in his life he lost because of the injury (Appellant's App. 63).

In *Williams v. Lewis*, 70 W.L.R. 194, this Court held:

“Where plaintiff suffers from an accident several years after its occurrence, the jury may infer permanent injury.”

The Court reviewed the entire case on a motion for a new trial and filed a written opinion. This Court's attention is respectfully called to that opinion.

This Court will also recognize the fact that the jury had a right to take into consideration “the value of the dollar” at the time it rendered its verdict. It is common knowledge that the dollar does not have as great a purchasing power today as in former years. *Washington & Rockville R. Co. v. La Fourcade*, 48 App. D. C. 364.

CONCLUSION.

Appellee respectfully submits that the action of the trial Court in failing to direct a verdict for the defendant, or to enter judgment in his favor notwithstanding the verdict, or to grant a new trial, was correct, and should be affirmed.

Respectfully submitted,

ROBERT E. LYNCH,
ANNA SHAPIRO,
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Washington, D. C.,
Attorneys for Appellee.

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 8357

JOHN T. HENKEL, *Appellant*,
v.
JOHN E. VARNER, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

APPENDIX TO BRIEF FOR APPELLEE

I

Excerpts from Testimony and Proceedings Designated by
Appellee

43 Mrs. Pearl Eunice Varner:

Direct Examination:

Q. When did you move from there, from Webster
Street? A. We moved in August.

Q. 1940? A. 1940.

44 Q. Next year, was it? A. A little over a year.
In 1940.

By the Court:

Q. From October until August? A. In August, 1940.

By Mr. Lynch:

Q. Your occupation in addition to being a housewife and a mother is also that you are a nurse? A. Yes. A registered nurse.

* * * * *

46 Q. You people didn't do that? A. No. We didn't do that.

Q. The landlord had it done through his agents? A. Yes, sir.

* * * * *

48 Q. Go ahead. A. And I told him—I wrapped it with towels and asked him to hold it. So I went across to the apartment of Mr. Simonds—he lived right in front of me—and asked him if he would drive Mr. Varner to the hospital right away.

Mr. Arth: I object to what she asked.

A. (Continued) And Mr. Simonds came over and took him to Garfield Hospital.

* * * * *

53 CROSS EXAMINATION by Mr. Arth:

Q. How many children do you have, Mrs. Varner? A. I have two children.

Q. How old are they? A. One is 4½ and the other is 2½.

By the Court:

54 Q. Girls or boys? A. Both boys.

By Mr. Arth:

Q. Did they live in the apartment at that time? A. Yes, sir.

Q. Did you bathe them there? A. I beg your pardon?

Q. Did you bathe the children there? A. Yes. In the mornings.

Q. In the mornings? A. Yes. Not in the tub. I had a little bathinette that I bathed them in.

By the Court:

Q. You say they are $4\frac{1}{2}$ and $2\frac{1}{2}$ years old. You mean now? A. Yes. They are now.

Q. The accident happened on October 22, 1939. That is over two years ago. A. Yes.

Q. One was about six months old then? A. No.

Q. When the accident happened? A. Yes, sir. He was just—

Q. Just a baby? A. Just a baby. In fact, both of them were born while I was there.

55 Q. Can you give us their birth dates? A. The oldest was born on March 31, 1937—

Q. And the other one? A. The youngest one was born May 30, 1939.

By Mr. Arth:

Q. Your baby was then just about five months old? A. Around that age.

Q. And your boy was $2\frac{1}{2}$ years old?

* * * * *

56 Q. Saturday night? A. Yes, sir.

Q. Now, you say that was the night before this accident? A. Yes, sir.

* * * * *

Q. The Friday before— A. —Mr. Varner was hurt?

Q. Yes. A. No, sir.

By the Court:

Q. He was not there? A. Not that Friday.

Q. Branham was not in that bathroom on Friday? A. No.

* * * * *

58 A. Not that I recall.

Q. Wait a minute—the 20th? A. The 20th of October? On Friday?

Q. The 20th of October.

Mr. Lynch: Just a minute. I submit, if your Honor please, that the question has been gone over and asked and answered before.

The Court: You understand that rule, Mr. Arth?

Mr. Lynch: That is why I am objecting to that. I don't think it is proper to go over that two or three times.

The Court: She may answer the question.

* * * * *

Q. Isn't it a fact, Mrs. Varner, that on Friday, the 19th of October, you complained to Branham, the janitor, that the bathroom water fixture spigot was leaking, and you asked him to put a new washer on? A. I did not.

59 Q. On the spigot? A. I did not ask him to put a new washer on.

Q. You complained to him, did you not? A. Yes. I did complain to Mrs. Gregory.

Q. On Thursday? A. No. I don't recall doing that, complaining, because I had complained so many times.

Q. You continued to use the fixture, did you not? A. Well, we had to.

Q. Well, you did? A. Yes, sir.

Q. Now, on Friday didn't you meet Branham in the hall and tell him that that plumber had not fixed, or he had not put a washer on the fixture, and that you would like to have new ones put on? A. No, sir.

Q. You didn't do that on Friday? A. No, sir.

* * * * *

61 Q. Mrs. Varner, are you sure that you complained about the leaking spigot to Mrs. Gregory? A. Sure, I complained to Mrs. Gregory.

Q. On this particular occasion, I mean. A. Yes. We had complained to her about it.

Q. Where did you see Mrs. Gregory?

By the Court:

62 Q. You say "we". Whom do you mean? A. Mr. Varner called her from the house while I was there about two weeks. That was—

By Mr. Arth:

Q. About two weeks before? A. That was the first time he came to fix it. And then Mr. Varner went over one evening and he also—

Q. Did you go with him? A. No, sir. Not that day.

* * * * *

65 Q. You know Mrs. Gregory quite well, do you not, Mrs. Varner? A. Yes. Just since I have been living there.

Q. Are you still good friends? A. Well, I don't go to visit her. Of course, whenever I see her, we always talk; and we have been by there several times, not to just see Mrs. Gregory, but just to see all of them.

By Mr. Lynch:

Q. In other words, you and Mr. Varner are a very sociable couple? A. Yes, sir.

By Mr. Arth:

Q. Mrs. Varner, were you and Mrs. Gregory good friends at that time? A. Yes. We were good friends.

Q. Did you visit one another? A. Well, she came over, especially around the time that I was confined and I couldn't get out of there. She always came around. Then we
66 would visit together over at another friend's house that we knew over there, quite often.

Q. Right up until the time of the accident? A. No, sir. I was with Mrs. Gregory, but we didn't go to the other house.

Q. But you visited at 131? A. Yes, sir.

Q. She was manager of 133 and 131? A. Yes, sir.

Q. Were you visiting each other during the week prior to this accident? A. I don't recall.

Q. Were you on good terms? A. Yes. We were on good terms.

Q. Mr. Varner and you visited the Gregorys in their apartment? A. Yes, sir. We usually met in the wash-room in the basement.

Q. And she visited at your apartment? A. Yes.

Q. Right up until the accident? A. I don't remember how long before. But we never went to see them every week or every day or anything like that. But we were friendly just at our most convenience and her most convenience.

* * * * *

70 RE-DIRECT EXAMINATION by Mr. Lynch:

Q. Mrs. Varner, did the maid come on Sunday or was the maid off on Sunday? A. She stayed with me, and lots of Sundays she went off, and that Sunday she was off.

Q. She was off that Sunday? A. Yes.

Q. Had she gone off at the time Branham came in and repaired the spigot on Saturday night? Had she gone off? A. I don't recall, but I don't believe she was there.

* * * * *

71 Q. What did Mrs. Gregory say to you a couple of days after the accident? A. I don't recall exactly what she said to me.

Q. What did she say to you about the spigot, anything about the spigot? A. She said the plumber was coming up to fix them for me.

By the Court:

72 Q. After the accident? A. Yes, sir.

By Mr. Lynch:

Q. Did she say anything about whether they were going to put a new spigot in? A. I don't recall whether she said she was going to put in all new spigots or not.

Mr. Lynch: That is all.

RE-CROSS EXAMINATION by Mr. Arth:

Q. Mrs. Varner, do you recall that the very next morning the plumber came and reseated those valves and put new washers on those valves? A. I don't recall what morning the plumber came, but I know he came.

By the Court:

Q. That was after the accident? A. After the accident.

The Court: The next morning the plumber came.

By Mr. Arth:

Q. The plumber came there? A. He came after the accident, but I don't recall whether it was the next morning or not.

By the Court:

Q. You are not sure about that? A. No.

75 **Harry Goldstein:**

Direct Examination by Mr. Lynch:

Q. He had been injured then? You knew when he was injured? A. That is right.

Q. You went around to see him, didn't you? A. That is right.

Q. He was injured on Sunday, wasn't he? A. That is correct.

* * * * *

76 Mr. Lynch: The question is, Mr. Goldstein, do you remember the day when he was injured, the day of the week?

77 Mr. Arth: Without looking at your memorandum.

The Witness: Let me see. The 22nd, I believe that was.

By Mr. Lynch:

Q. What day of the week was that? Monday? A. It was on a Sunday.

Q. What day did you see him after that Sunday? When did you first see him after that Sunday that he was injured?

A. On the next day. I mean, I saw him on Sunday and I saw him on Monday.

By the Court:

Q. Where did you see him on Sunday? At his home?

A. I think he was coming down—I had him come down to the store on Monday just a little while.

Q. Down to the store? A. Yes.

By Mr. Lynch:

Q. Was his hand bandaged then or not? A. Yes, it was.

Q. Was he able to hold the hammer and saw in his hand?

A. No.

Q. Or to go around and work? A. He was not.

* * * * *

78 Q. Did you have other men working there as carpenters? A. Yes. While he was there I had four other men.

Q. While he was there? A. That is right. When he came in injured, I hired additional men.

Q. You hired four men? A. That is right. To speed up the work.

Q. When he was injured you only had him alone? A. Yes. At the time he was there he was there alone.

Q. Do you know whether on the week of the 14th he made a full week, whether he worked every day on the week ending the 14th? A. Yes.

Q. And the week ending the 22nd had he worked a full week? A. That is right. A full week.

Mr. Lynch: You may examine.

* * * * *

80 Q. Did he work for you afterwards? A. No, sir.

Q. Do you know where he did work afterwards? A. No, sir.

* * * * *

81 RE-DIRECT EXAMINATION by Mr. Lynch:

Q. Mr. Goldstein, this last week that he worked for you and you paid him \$25, that was more as a favor to you, wasn't it? He knew what was to be done?

82 A. Yes. It was to help me. Yes. I couldn't explain the instructions on the plans to a new carpenter. I thought maybe they would make mistakes that would be still more costly. So I thought it was to my advantage to have him around, just to see that they do the thing right. He knew just what I wanted.

Q. Did he do that with his hand bandaged? A. That is right.

Q. You didn't see him do any manual work in there? A. No, sir.

Mr. Lynch: That is all.

84 Dr. Richard B. Castell:

Direct Examination:

90 The Court: We know that his finger was cut off, unless you want all these details.

Mr. Lynch: No. I don't care about that, your honor.

By the Court:

Q. Is this (indicating) the anesthesia? A. Gas and ether.

Q. That is general? A. General anesthetic. Dr. Seidel.

* * * * *

By Mr. Lynch:

Q. Would you say it would cause quite a bit of pain?

A. Well, that depends on—There are too many individual differences to tell you very much.

Q. You would say he did have pain? A. Yes.

Q. He suffered considerable pain, didn't he? A. He had pain with both operations and the injury. After all, all that is going to hurt you some.

91 Mr. Lynch: You may examine.

Mr. Arth: No questions.

(Witness excused.)

The Court: Now he may take the records?

Mr. Lynch: You may take the records right back with you, if you want to.

The Court: Thank you, Dr. Coker.

93 **John E. Varner:**

Direct Examination by Mr. Lynch:

100 Q. Was he coming to work on that job? A. He was to sweep up Goldstein's, to clean out the floor. When you are sanding a floor, it is really dusty. If you can't get the dust off, you can't sand the floor, because you don't know where you are sanding.

Q. Branham was to come up there that same afternoon and do that for you and Mr. Goldstein? A. Yes.

Q. And he didn't show up? A. That is right.

Q. And you went in and asked him about it? A. That is correct.

102 Q. You didn't do the painting and papering, did you? A. No.

Q. They would have somebody come in and do that? A. Yes. Somebody from the Rust Company.

Q. You didn't do any painting yourself? A. I didn't do any of that.

Q. They would have that done? A. I imagine if Rust didn't pay for it, they didn't get paid for it.

Q. I say, you didn't do it?

By the Court:

Q. Did they paper it? A. They papered it and painted it one time in two years, and I threatened to move if they didn't paint it, and they did it. Then we stayed another year, and I bought my home and moved out.

* * * * *

105 Mr. Lynch: Mr. Arth, do you wish to see this? I ask the reporter to mark it for me, and also this.

The Court: Are you agreed on these bills?

Mr. Arth: I haven't seen them, your Honor.

Mr. Lynch: It will only take a minute or two to prove them all, your Honor.

Mr. Arth: I have no objection.

* * * * *

108 Mr. Arth: Don't you have all of the bills here?

Mr. Lynch: No. I don't have them—I don't know whether I have a list of them here or what they are. I don't know.

Mr. Arth: The George Washington representative was here.

Mr. Lynch: Yes. I know he was. If you want

Mr. Lynch: No. I don't care about that, your honor.

By the Court:

Q. Is this (indicating) the anesthesia? A. Gas and ether.

Q. That is general? A. General anesthetic. Dr. Seidel.

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By Mr. Lynch:

Q. Would you say it would cause quite a bit of pain?

A. Well, that depends on—There are too many individual differences to tell you very much.

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Q. He suffered considerable pain, didn't he? A. He had pain with both operations and the injury. After all, all that is going to hurt you some.

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Q. Branham was to come up there that same afternoon and do that for you and Mr. Goldstein? A. Yes.

Q. She was the manager of those two apartments, 131 and 133, where you lived? Isn't that correct? A. Yes, sir.

Q. Did she visit at your home? A. A number of times.

Q. And you visited their home? A. Went over there and played poker.

Q. Were they there in your apartment during the week prior to this accident? A. Were they at my apartment?

Q. Yes. A. No, sir.

Q. Were you in their apartment? A. No, sir.

Q. When did you stop visiting one another? A. There was no stopping to it. When you work you don't have time to visit.

Q. Just didn't happen to be there during that week?

A. To be there during the week?

125 Q. Yes. Not seeing them. A. You would see them out in the court. When you are living in an apartment, it is nothing but a big court. All of you would be out there in the big court.

* * * * *

126 A. That is right.

Q. When you wanted to turn the faucet on? A. Turn it on.

Q. To turn it on? A. To turn it on, that way (indicating). And to shut it off this way (indicating).

* * * * *

127 Q. Both handles like that (indicating)? A. Sitting like that (indicating).

By the Court:

Q. You have two of them? A. Yes.

By Mr. Arth:

Q. Now, when you want to turn on this—How is
128 your bath tub? A. Just like you are sitting.

Q. Facing you? A. Just like you are.

Q. Where I am sitting? A. I am on the commode. This is the bath tub right here (indicating).

Q. Right there? A. Yes, sir.

Q. And this fixture, then, was right here (indicating)?
A. Right here (indicating).

Q. Is that correct? A. Right here.

Q. Right down here? A. Yes, sir.

Q. And the hot water—is that at the side of the tub?
A. The cold is here and the hot is like this (indicating).

Q. Your bath tub ran this way (indicating)? A. The bath tub ran this way (indicating). The commode is facing this way, and the water—

Q. This is the outside of your tub? A. Yes, sir.

Q. This is where you were sitting? A. Yes, sir.

Q. And here is the fixture? A. Yes.

* * * * *

130 Q. Isn't it a fact that you got up that morning at 9 o'clock and went into the bathroom to shave?

A. To what?

Q. You heard what I said, didn't you? You went into the bathroom to shave? A. I can't say what I did or not. I don't remember whether I went in there to shave or whether I went in to do something else.

Q. Wasn't it after 9 o'clock in the morning? A. I am not positive whether it was after 9. But I got up—

131 By the Court:

Q. Now, wait. Let us see. Say that over again. Let us fix the time. A. I know I worked until around 1:30 Saturday night. I am not positive what time I got up.

* * * * *

Q. Your wife didn't go with you? A. She couldn't leave my babies.

Q. I asked if she went with you? A. No, sir.

Q. She didn't go. Did she come down later? A. Yes, sir.

Q. How long after? A. I was on the operating table. It was at least three-quarters of an hour.

Q. Isn't it a fact that there was no doctor there when you got there? A. I think she is the one that got the doctor out.

Q. Isn't it a fact that there was no doctor there at the hospital when you got there? A. I could almost swear that there was not.

132 Q. You didn't see one? A. No, sir.

Q. Until after she got there? A. I know there was a doctor there when I woke.

Q. Just answer my question? A. I don't know, sir, whether there was a doctor there or not.

Q. You didn't see one? A. No, sir.

Q. Your hand was cut? A. Yes.

Q. You went there to get a doctor? A. Yes.

Q. You went immediately or not over half an hour? A. Yes.

Q. Then you called one of your own? A. My wife came in.

Q. She came in? A. Yes.

Q. How long afterwards? A. I don't know.

* * * * *

133 A. Yes.

* * * * *

134 By Mr. Lynch:

Q. You say you didn't—

By Mr. Arth:

Q. You didn't go that way (indicating)?

Mr. Lynch: Just a minute.

A. How could I?

By Mr. Arth:

Q. You didn't have the handle like that (indicating), did you? A. Why, no, sir.

* * * * *

135 Q. You didn't turn it this way (indicating), did you? A. How are you going to turn it that way?

Q. I asked you, did you? A. No, sir.

Q. You turned it this way (indicating)? A. Yes, sir.

Q. That way (indicating) and then this way (indicating)? A. I told you what I did.

* * * * *

139 Q. And about putting washers on there. Did you see Branham in there on Saturday? A. I certainly did.

Q. What time? A. It was between 5 and 6.

Q. Isn't it a fact that on the day on which Branham fixed those washers you told your wife, or your wife told you when you came in that evening, that Branham had been there and put the washers on?

Mr. Lynch: I object.

A. No. She didn't no such. She did not say nothing about Branham being there. When I came home, my wife was in the kitchen cooking, and Branham was in the bathroom, and I went in and asked Branham why didn't he come up and help me, as he promised to.

Q. That is correct, is it? A. That is correct, sir.

Q. Was there anything said about a leak in the kitchen sink?

140 Mr. Lynch: I object to the question, if your Honor please. When I object, Mr. Varner—

The Court: Why do you object?

Mr. Lynch: I object to it as immaterial and irrelevant.

The Court: It is not immaterial.

Mr. Lynch: All right.

The Witness: Was there any question that you asked me?

By Mr. Arth:

Q. You said about a leak in the kitchen sink, Branham having fixed that. A. I didn't tell him to fix no leak. No, sir.

Q. Did your wife say anything to you about that? A. No, sir.

Q. You say you are not sure whether it was 9 o'clock or after 9 when you went to the bathroom? A. I didn't say that. I said I got up that morning. I couldn't be positive whether it was 6:30 or 7 or 7:30. I know I got up. My wife was cooking breakfast for me, for me to go back to work. I was supposed to finish this ten-cent store. And I went in and sat down on the stool—

Q. Just a minute. Just listen— A. (continued) —and this thing happened, and I went to the doctor's, and that is all I can tell you.

Mr. Arth: There is no use trying to stop him.

141 By Mr. Arth:

Q. You say that the first job you had after this accident was— A. Charles H. Tompkins.

Q. A week's work with Mr. Goldstein? A. No. I did not have no week's work. He asked me to supervise the work for him.

Q. But you were there and he paid you for that, didn't he? A. I didn't have to stay there, sir.

Q. Did he pay you for that week?

* * * * *

142 Q. What was the next job and when was it? A.

After my hand got so I could go to work, I went to work for Charles Tompkins on the sewer disposal over in Bennings.

Q. Sewer disposal? A. In Bennings.

Q. What were you doing on that job? A. As a carpenter.

Q. What did you do on that job? A. Fixed forms and built whatever I was told to do.

Q. Were you a foreman carpenter? A. No, sir. I was the steward on the job.

Q. When were you ever a foreman on a job? A. I did the Sears Roebuck on Wisconsin Avenue for George A. Fuller.

143 Q. When? A. I beg your pardon?

Q. When? A. When did I do what?

Q. When did you do the work that you were just talking about?

By Mr. Lynch:

Q. The Sears Roebuck job. What year was that? A. You have got it right there in your hand.

Q. What year was it? A. This year.

Q. 1940? A. Yes, sir.

Q. Were you foreman on that job? A. Yes, sir.

By Mr. Crenshaw:

Q. 1941? A. 1941. That is right, sir.

By Mr. Arth:

Q. Have you ever been a foreman carpenter before 1941? A. I was a foreman carpenter in 1940 and 1939. From 1922 up to now. I started in to work as a carpenter foreman with Charles R. Sterrett.

* * * * *

146 Q. Do you have a bank account? A. No. My wife has a bank account.

Q. Do you have one? A. No. My wife has it.

Q. Is it a joint account? A. Yes, sir.

Q. Where is that account? A. I beg your pardon?

Q. Where is it? In which bank? A. Well, I don't know that has anything to do with it.

Mr. Lynch: Answer the question. Just answer the question, Mr. Varner. It is not for you to say.

A. (continued) Park Road.

By Mr. Arth:

Q. Is that the only bank account you have?

Mr. Lynch: I submit, your Honor, that he has gone far enough. On this question of negligence involving injury, whether the man has a bank account doesn't make any difference.

147 The Court: You are claiming loss of time, that he wasn't able to work. He has testified that he worked certain times. If he can show deposits that he made, perhaps that would be relevant.

Mr. Lynch: If your Honor please, if he will say that that is the purpose of it, I have no objection.

The Court: I don't know what the purpose of it is.

Mr. Lynch: Then I submit that he should tell us whether he proposed to do that.

The Court: He is not obliged to do that. That is not a proper request.

Mr. Lynch: I submit that it is a proper request. I submit that he should not be permitted to go further with this type of cross examination.

The Court: I don't know what it will lead to. Go ahead.

By Mr. Arth:

Q. Do you have an account of your own anywhere? Is that the only bank account that you have? A. I have Veterans' bonus, \$1557.50 in Veterans' bonus. But that is bonus money, I mean, certificates. That is not in the bank.

Q. I didn't ask you that. I asked you about a bank account. Didn't you hear me ask about the bank account?

A. Yes. But I have no more money.

148 By the Court:

Q. The question is, Do you have any other bank account? A. No. The Park Road is the only one. I had one in the Commerce Bank, and it went broke.

The Court: You and some others.

By Mr. Arth:

Q. Did your wife work during the time—

Mr. Lynch: I object to the question as immaterial and irrelevant.

A. Did my wife what?

Mr. Lynch: Just a minute, Mr. Varner. I object to it, if your Honor please.

The Court: It is a little irrelevant unless you want to show how much she could have been able to do for him.

Mr. Lynch: It doesn't make any difference about the joint account.

A. No. She did not work.

Mr. Lynch: Just a minute, Mr. Varner.

The Court: He has already answered. But I don't see the relevancy.

By Mr. Arth:

Q. Did you put anything in that bank other than your earnings? A. I got something in there for my two boys.

Q. No. I mean deposits. Did you make any deposits in that joint account other than your earnings? A.

149 I don't get that.

By the Court:

Q. The money that you put in that bank—was that money that you earned? A. Yes, sir.

Q. No other funds? A. I paid for my car and stuff like that.

Q. Not what you were paying for. What you put in.

By Mr. Lynch:

Q. Did somebody give you some money— A. No, sir.

Q. —like your brother or your mother— A. No, sir.

Q. —give you something and you put that in? A. No, sir.

By Mr. Arth:

Q. Now, Mr. Varner, you said in response to Mr. Lynch's question that you got up at 6:30 o'clock on that Sunday morning. A. I still say I am not positive on the time.

Q. Just listen to my question. You said a little while ago—Can you say now that it was 6:30? A. I do not know what time it was. I know my wife called me—

150 Q. I am asking you if you know. A. I do not.

I could not be positive of it to save my life. I know I was still sleepy.

Q. Do you recall what you did prior to that, to hurting your hand? A. Prior to hurting my hand?

Q. Between the time that you got up and the time you hurt your hand, do you recall what you did? A. Went to the bathroom, washed my teeth, and sat down on the stool.

Q. That is all you did? A. Looked at the paper for a few minutes.

Q. Where were you when you were looking at the paper? A. Sitting on the commode.

Q. Was the spigot leaking then? A. No, sir. There was no leaks in there. The only thing, the cold water I turned on was running. I turned it on just slow, so I could read the paper.

Q. Didn't the spigot leak a little?

Mr. Lynch: He didn't say it leaked.

A. I said—

Mr. Arth: I am asking him. You are not the witness.

Mr. Lynch: I know. But what is the use of going over something that has already been testified to, if your Honor please.

The Court: Just answer the question.

151 A. The cold water was running slow.

By Mr. Arth:

Q. No. I am asking you, before you turned on either faucet— A. —was the spigot leaking?

Q. Yes. Was it leaking? A. No, sir.

By the Court:

Q. It had been repaired then if there ever was a leak?

A. He repaired it, sir.

* * * * *

153 By Mr. Arth:

Q. Had a new, or had a different porcelain handle been put on the fixture in the meantime? A. What do you mean?

Q. On Monday morning? A. I don't know whether they put it on or not. I don't remember that, whether they put it on, the new one, on Monday or when. But I had the part in my hand, not that part (indicating), but the other part. That was already there.

Q. You had this (indicating)? A. Yes. That was in the apartment.

Q. This here (indicating)? A. Left there after it broke.

154 Mr. Lynch: May the record show, Mr. Reporter and your Honor, that the part that the witness referred to is completely porcelain?

The Court: That is the top part of the handle.

Mr. Lynch: Yes.

A. (Continued) That was laying on the floor in the bathroom.

By Mr. Arth:

Q. Lying on the floor of the bathroom? A. That is right. The commode set here (indicating). It was sitting right down here (indicating) on the floor.

Q. The remainder of the handle— A. —was intact on the faucet.

Q. Which is metal and a bit of porcelain around it with an "H" on it. That was where? A. That was still in the tub. This (indicating) was lying on the floor and that (indicating) was on the faucet, as it was when it was broken.

* * * * *

155 Q. What kind of handle was on that bathroom fixture on Monday afternoon? A. I was not in the bathroom, sir. I got out of the hospital and I went to bed with this hand, and I did not go in the bathroom.

Q. Do you mean that you were home all day? A. That is right.

Q. Didn't you say a little while ago that you went around to Goldsmith's or Goldstein's? A. I beg your pardon?

156 Q. On Monday? A. No. You asked me when I came from the hospital and about my hand; where did I go.

Q. No. I am talking about the next day, Monday. A. I am talking about Monday. About 9 o'clock Monday morning, and I walked up to Goldstein's job, and he asked me about my hand.

Q. I am not asking you what he asked you or anything about that. I am merely trying to find out if you were in

your bathroom on the 23rd of October, which is the day after you injured your hand. A. I got you wrong. I thought you said "Sunday."

Q. I don't care what you thought I was asking you. That question— A. I got in there Monday morning.

Q. Monday morning? A. Yes, sir.

Q. Did you turn on the hot water? A. You have to. We have a gas—

Q. I say, did you turn on the hot water in the bath tub? A. I turned it on in the basin. We have a basin as well as a bath tub.

Mr. Lynch: He asked you about the bath tub.

By Mr. Arth:

157 Q. I asked you about the bath tub. A. No, sir. Did not touch it.

Q. What was the condition of that handle at that time? How much of it was on the fixture? A. That little stub (indicating).

By Mr. Lynch:

Q. This one right here (indicating)? A. Yes, sir.

By Mr. Arth:

Q. Did you make any attempt to turn on the hot water? A. No, sir.

Q. In the bath tub? A. No, sir. Did not touch it.

Q. Did you that evening? A. No, sir.

Q. Did you the next day? A. No, sir.

Q. Or the next day? A. No, sir.

Q. Did you ever get that bath that you were talking about that you were going to get? A. No. My wife gave me a bath.

Q. When did you get it? A. When did she give me the bath?

Q. Yes. A. The Sunday after I cut my hand. In the bed.

158 Q. In the bath tub? A. No, sir. In my bed.

* * * * *

159 By the Court:

Q. A matter of days that you got it? A. It was a matter of days. It was not months. There is Mr. Berger (?) sitting over there. He can tell you.

Mr. Lynch: Just answer the question.

160 By Mr. Arth:

Q. Mr. Varner, how long after this accident was it that you first used the hot water bathroom fixture? A. I don't know.

* * * * *

Q. Don't you know, Mr. Varner, that a handle was put on that fixture, another porcelain handle, the very next morning?

Mr. Lynch: He said he did not know.

A. No, sir. I do not.

By Mr. Arth:

Q. October 23rd? A. No, sir.

Q. You don't know anything about it? A. No, sir.

Q. Do you remember that stub on that handle after you injured your hand? A. I know when I came back from the hospital it was still there.

Q. Yes. But it wasn't there the next day, was it? A. I don't know about that.

161 Q. Was it there Tuesday? A. I am telling you, I don't remember whether it was there or not.

Q. Were you ever a pattern maker? A. Yes, sir.

Q. When? A. In 1919, when I came out of the service.

The Court: A cabinet maker?

Mr. Arth: A pattern maker.

The Witness: Yes, sir. I was a pattern maker, too.

By Mr. Arth:

Q. You have been one since 1919? A. I was not a pattern maker in 1919. You asked me if I was a carpenter in 1919.

The Court: You said "pattern maker." You meant "cabinet maker"?

Mr. Arth: Pattern maker, your Honor.

The Court: I understood him to say that—

The Witness: Yes. I was a pattern maker at the War Department, the War College, down in the Southwest, in 1919. It was the time the C. W. A. was created, whenever it was. The C. W. A. was in progress at the time, and I put in all the last lot of doors down there.

By the Court:

Q. Is that what you call a pattern maker? A. Yes, sir.

* * * *

162 By Mr. Arth:

Q. Which jobs? A. The only times I was ever fired in my life.

Q. The only times you were fired in your life? A. Was on account of this hand.

* * * *

163 Q. You got another job as foreman? A. Yes.

Q. Right off the bat? A. Sir, if you got a family, you have got to work. That is the way I look at it.

* * * *

164 Q. Now, where did that Hammy job—where did you say that was? A. It was on Fourteenth Street. That was a little repair job. I don't know just what it was, but I can find out.

304 **Robert J. Barrett:**

Direct Examination by Mr. Lynch:

Q. When did you become a registered plumber?

305 A. About 1924 I became a licensed registered plumber.

Q. Had you done plumbing work before that time? A. Yes. About thirty-five years all told I have been in the plumbing business.

Q. In recent years you have gone into the government service? A. That is right.

Q. In the position that you are in do you have supervision over the planning of plumbing? A. The planning of plumbing, and to see that plumbing is planned by architects and engineers in conformity with the regulations of the District.

Q. In your business and professional trade at the time that you were practicing it did you have occasion to fix spigots, adjust them, replace them, and repair them? A. I have.

Q. Many times? A. Many times over the period of about thirty-five years that I speak of.

Q. Are you familiar with porcelain handles? A. Yes, sir.

Q. I show you a porcelain handle which is in two parts, which has been offered in evidence on behalf of the plaintiff in this case (handing the witness Plaintiff's Exhibit 2). I ask you to examine it. Now, I ask you whether

306 or not you can give us an opinion as to whether or not before it was broken it had a crack in it. A. Well, I would say that this faucet had a crack into it prior to the time it was broken, because it shows evidence here (indicating) of dirt having seeped in; and there is no question in my mind that that must have been cracked for some time before it broke, because this is a discoloration from the water and dirt that had been ground into it.

Q. Is there also a discoloration up near the top of the broken-off piece? A. Yes. Right up in there (indicating).

Q. Mr. Barrett, you are familiar with the washer which stops the water and permits water to go through a faucet, are you not? A. Yes, sir.

Q. Is there also a packing which prevents water from coming up through the arm at the handle of the spigot, such as—I show you an old-time one for the purposes of illustration. Is that an old type of washer? A. That is an old type. Yes, sir.

Q. Is there also a packing in this little arm that comes up to the handle? A. Yes. There is a packing in there.

Q. Now, I will ask you, Mr. Barrett, to assume that this handle which you have just examined a few moments
307 ago was on a spigot of a bath tub, and that on a Saturday something was done to it to prevent it from stopping a leak—

The Court: You know what was done to it under the evidence now.

Mr. Lynch: In other words, there is a conflict in the evidence. The defendants—

The Court: Well, this would not be rebuttal evidence.

Mr. Arth: No. That is what I say, your Honor.

The Court: I permitted you to prove that because we didn't know exactly what was done. But now you do know.

Mr. Lynch: I am going to read the same question that I asked Mr. Colbert unless your Honor says that I cannot do so.

The Court: I don't think so, because that was part of your case in chief.

Mr. Lynch: All right.

* * * *

By Mr. Lynch:

308 Q. How about the reseating of the valve? When do you reseat them? A. Well, every faucet when it is repaired should be examined first to see whether or not the seat is in proper condition. If the seat is scored or chipped in any way, that should be ground before a new washer is put on there.

But, if you will permit me, it is just foolishness to put on a washer, for the simple reason that you might turn your faucet down once or twice or three times, and the rough seat would grind that out, no matter how tightly you turn it down; and your washer would be of no use; and just a few times of turning on and turning off the faucet—

Q. And if a washer were put on without reseating it—let me put it this way: If a washer were put on and the valve had not been seated, if it were done properly, would it stop the leak? A. If the seat were in proper condition, yes, sir.

309 Q. It would stop the leak? A. Yes.

Q. And if it needed reseating, they should regrind the valve? A. There is a grinder that comes for that purpose. Yes, sir.

Q. Where the valve does need regrinding, but they don't regrind it, but merely put on a washer, then to stop the leak

they have to turn it very tightly, don't they? A. Have to turn it down very hard. And, as I said a while ago, just one or two or three times your washer is gone. It would really be foolish to put in a new washer.

Mr. Lynch: You may examine.

CROSS EXAMINATION by Mr. Arth:

Q. Mr. Barrett, when you put a new washer on a scored base, valve, that doesn't stop the drip, does it? A. Yes, sir.

Q. It does stop the drip? A. Yes. That would stop the drip, because you would cut it down while your washer was full thickness. You would cut it down to such an extent that you would for a few times tighten the spigot sufficient to keep it from dripping.

Q. Well, suppose, Mr. Barrett, that a washer was put on a valve, a new washer, a flat disc washer, composition, and it should continue to drip. Wouldn't that indicate that the valve needed regrinding? A. If it would continue to drip.

310 Q. Yes. A. I would say with all my experience that I have never put one on, no matter how badly it was scored, that I couldn't stop the drip.

Q. That you couldn't stop the drip? A. No, sir. But I would not put a washer—

Q. With a flat washer? A. With a flat washer. But I wouldn't put that washer on until I had first tested the seat to see if that were in proper condition.

Q. And if the seat is not in proper condition, you cannot stop the drip by putting on a new washer, can you? A. Yes, in most of the cases you can, because the scoring is not of sufficient depth in the seat to keep the washer from grinding down into it.

Q. What did you mean in your testimony here a few mo-

ments ago when you said that if the seat of a valve were scored it would have to be reground? A. It should.

Q. Because it would continue to drip? Didn't you say that? A. I don't think that you got me right. My testimony was that it would stop it; but if that was continuously used for one, two, or three times, then it would start to drip.

Mr. Arth: Would you be good enough now to turn
311 to the witness' examination in chief, Mr. Bennett, for me, when Mr. Lynch was examining him about the grinding of a valve, where he said that if it was scored, it would have to be reground?

By Mr. Arth:

Q. Isn't that what you said? A. I said it should be.

Q. It should be. Yes. A. After examination and finding that that seat is scored, it should be ground. No question about that.

Q. And especially if there is a drip in the faucet? A. I said that then there would be no drip in the faucet possibly, but in all probability you could—

Q. Do you mean that you can renew the washer in a faucet and in every instance cure a drip? A. I would say so.

Q. You can? A. Yes.

Q. No matter what kind of a washer? A. Yes, if it is not too badly scored; has not been battered or hammered or something like that.

Q. If the faucet has not been battered or hammered? A. Yes.

Q. But suppose it did continue to drip? A. Then it should be reground.

312 Q. Reground? A. Yes. But just a minute. Let me clear myself. I am not putting this washer on and let it continue to drip.

Q. To let it what? A. I am not putting a washer on and let it continue to drip. Don't misunderstand me.

Q. You mean, if a washer were put on, it would stop the drip? A. It would stop the drip. Yes. I was just afraid that the gentleman was a little confused there.

By the Court:

Q. How quickly can you stop a drip on that type of faucet with the seat scored and needing grinding, and get it smooth, by putting on a new washer and cutting it down? How soon would that stop the drip? A. If you regrind the seat?

Q. No. I am not regrinding the seat. A. Immediately.

Q. It would stop it immediately? A. Yes.

Q. Wouldn't it drip a little? A. You might have to turn it a little harder to get it down on the unground seat.

Q. Unground seat? A. Unground seat.

By Mr. Arth:

313 Q. Well, Mr. Barrett, if it does drip, you have to give it a great deal of pressure to stop it, wouldn't you? A. That is the idea. Yes, sir. That is, you still bring out the word "drip." You would stop the drip by turning down harder. I want to make myself clear on that point, sir.

Q. You wouldn't turn it down, Mr. Barrett, under ordinary usage, ordinary pressure, would you? A. I have seen it done.

Q. I am not asking you that. If it continues to drip, you could use enough force to push it down, if you use a pair of pliers, or if you were strong enough, you could push it down hard enough to stop it; isn't that correct? A. May I answer you in this way: that if I personally were turning that faucet and turning it down a natural hardness or natural stop, whatever you want to call it, and found a drip there, I could turn harder and stop that. But

if I found that condition, I would immediately shut the water off and grind that seat.

Q. Yes. But if you were not a plumber, you would not grind the seat? A. No. If I were not a plumber. I have said "a competent man" in my statement.

Mr. Arth: That is all.

314 RE-DIRECT EXAMINATION by Mr. Lynch:

Q. If a janitor went in and put a washer on a spigot, and after putting it in it still continued to drip, and you had a registered plumber right downstairs—

Mr. Arth: Oh, now—

By Mr. Lynch:

Q. (Continued)—in the place—wait a minute, Mr. Arth—would you call the registered plumber up and have him reseal the valve?

Mr. Arth: I object to that.

The Court: I sustain the objection.

By Mr. Lynch:

Q. A plumber could reseal a valve very quickly, couldn't he? A. Yes.

* * * * *

By Mr. Lynch:

Q. Can an ordinary janitor who has not had any plumbing experience tell whether a valve needs resealing or not? A. I wouldn't say that he could.

* * * * *

315 RE-CROSS EXAMINATION by Mr. Arth:

Q. How long have you been in the government service? A. Less than three years.

Mr. Arth: That is all.

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325 Mr. Lynch: If your Honor please, on yesterday a witness testified, and I talked with him later. There was a mistake in his testimony. I would like to call him this morning and correct it. May I call him?

The Court: Yes.

187 **Albert Branham:**

Direct Examination by Mr. Arth:

A. Like that (indicating)?

Mr. Lynch: I think, your Honor, we ought to describe that for the record so we will know what happened.

The Court: I don't know what he means there.

* * * * *

204 **CROSS EXAMINATION** by Mr. Lynch:

Q. Assuming that this (indicating a pencil) is the type of spigot and this silver part is the top of the spigot and this (indicating) is where it meets the pipe,
205 where the water comes out— A. Yes.

Q. Now, you show the jury whether it was straight up, whether it was straight down, or what position it was. This is the way it would turn (indicating)?

A. Yes.

Q. You just take that and show how (handing pencil to witness). A. Well, the spigot is just in that position (indicating).

Q. Just hold this so that this handle is indicating where it meets the pipe, and the other part is the pipe. This (indicating) is the outside part.

The Court: You are concerned with the handle?

Mr. Lynch: The handle alone.

By Mr. Lynch:

Q. Which way would the handle be? A. It would be like that (indicating with pencil about like this:) \

By the Court:

Q. Are you speaking of the cold or hot water now? A. Cold water.

By Mr. Lynch:

Q. How would the hot water be? The way that you have it here? A. The same way.

Q. The same way. Thank you very much. When you turned it—hold this right there—when you turned it, which way did you turn it? Take it with the other hand
206 and show us which way you turned it? A. Wait a minute. This is—I am supposed to get hold of the spigot?

Q. The handle. Just the handle. A. I turned it up this way (turning handle down).

Q. You are turning it down, aren't you? A. No, sir.

The Court: He is all balled up and he has us all balled up.

By Mr. Lynch:

Q. Can you show me?

The Court: Do you have that handle?

Mr. Lynch: Yes, your Honor.

The Court: Wouldn't it be better to illustrate it with that?

By Mr. Lynch:

Q. This is the handle that was on there (holding Plaintiff's Exhibit 2 before the witness). This part, the upper part, is connected with—that upper part would be connected with the other part of the spigot, wouldn't it, Albert, this part here (indicating)? A. Yes, sir.

By the Court:

Q. Where is the top of that handle? A. The top of it is up here (indicating).

Q. That is the top that you are holding in your
207 hand? A. Is this the top?

Q. Yes. That is what you have hold of, isn't it?
A. Oh, yes. That is it.

Q. Now, you just get hold of that place and turn it. How was that standing—that is what he wants to know—when the water was off? A. When the water was off it was standing like this (indicating about like this:) \

By Mr. Lynch:

Q. And how would you turn it?

(The witness answered by turning the handle downward toward his right.)

Mr. Lynch: May the record show that the witness indicated that the handle, that the end of the handle, would be pointing—

Mr. Arth: The porcelain end of it.

Mr. Lynch: —would be pointing in a general downward direction into the bath tub proper.

By Mr. Lynch:

Q. Is that correct, Albert? A. That is right.

Q. In a downward way. Not precisely downward— A.
No.

Q. —but half way between a vertical and completely downward?

Mr. Lynch: Is that correct, Mr. Arth?

208 Mr. Arth: If he is talking about the way you use the handle—he told you how the handles were over there—the hot water handle that way (indicating) and the cold water this way (indicating). Now, what are you trying to do? I don't know.

The Court: I am going to straighten this out for myself, if you gentlemen will permit me to. Let me have that photograph that you had there.

(Mr. Arth handed the Court Defendant's Exhibit 1.)

* * * * *

209 By Mr. Lynch:

Q. Not quite down that far? A. No, sir.

Q. Would it be pointing like this tub here, this pipe where the water comes out (indicating)? Is that about the way it was? A. No, sir.

* * * * *

211 Mr. Lynch: I think we have got what we want now.

The Court: If you are not satisfied with that situation, of course you have the re-direct. I don't want any confusion about it. All we want to know is the facts about it.

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212 By Mr. Lynch:

Q. Did all of them work that way, Albert? A. No. Not all of them, I don't think.

The Court: Don't drop your voice.

A. (Continued) No, sir. I don't think all of them works that way. They may work that way now. There has been lots of changes in the bath tubs.

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214 By Mr. Lynch:

Q. Two stories and basement? A. Two stories on the basement.

Q. Is there a furnace in each building? A. Yes, sir.

Q. Is that a coal-fed furnace? A. Yes.

Q. Do you shovel coal in it or have a stoker? A. No. You shovel it in.

Q. You take out the ashes and clean out the floors? A. Yes.

Q. And clean out the downspouts when they get stopped up? A. Oh, yes.

Q. And put washers in spigots? A. Yes.

Q. And plunge out toilets and sinks? A. Yes.

215 Q. Did you go in the Varner apartment after Mr. Varner was hurt? A. I didn't go in there right away after he was hurt.

Q. When did you first go in there after he was hurt? A. I can't just remember now. I don't know as I had any calls to go in there after that.

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217 Q. You didn't make a written report of that, did you, that shows that at 9:30 on Thursday morning you put a washer on the spigot? You didn't make any written report about that to anybody, did you? You just kept it in your own mind, didn't you? A. Oh, I told Mrs. Gregory about the washer, and she told me—

Q. Yes. But you didn't write it down? A. Oh, write it down?

Q. You didn't write it down, did you? A. No, indeed.

Q. But you remember now that it was Thursday morning and not Friday morning? A. Yes.

Q. Did anyone else ask you for a washer on Thursday morning that you know of for a spigot? A. I can't remember that now.

Q. You can't remember that now? Did anyone else ask you for a washer on Friday morning that you can remember of? A. No.

Q. Tell us who asked you for washers on Wednesday morning, Albert, for spigots. A. Wednesday?

Q. Yes. The day before Mrs. Varner asked you. A. Didn't anybody ask me for washers.

Q. Didn't anybody ask you on Wednesday afternoon for washers? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. It was about two weeks before this that they asked you for other washers in the Varner apartment; is that correct? A. Two weeks before?

Q. Yes. Two weeks before that Thursday. A. No.

Q. When did they ask you for washers before? How long before? A. Oh, I don't know how long before it was. But I said I had put on washers in there before.

Q. Tell us how long it was before that Thursday that you put on washers or they asked you for washers.
219 A. I couldn't tell you when it was, but I know I had put on several washers there.

Q. Had you put them on several times in the year 1939?
A. Yes. I had put them on several times that year.

Q. You put some on in the bath tub? A. Yes.

Q. In 1939, didn't you? A. Different times.

Q. On both spigots? A. I don't know about both spigots.

Q. You don't remember that? A. No.

Q. You remember now that you put it on at least one spigot? A. Yes, sir.

219 Q. You haven't talked to anybody, have you, Albert, about this case? A. No, sir.

Mr. Lynch: That is all.

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223 Mr. Arth: He doesn't know whether it is hard rubber.

Mr. Lynch: He said it was.

Mr. Arth: No. You said it.

By Mr. Lynch:

Q. Is it hard rubber or not? A. Let me see that.

Q. All right. You look at that (handing spigot to witness).

Mr. Arth: Be fair with him. Wait a minute.

Mr. Lynch: I will be fair with him. Don't worry about me being fair. Just take care of your own fairness. If you do that, you will have a job.

The Witness: All right. That is hard rubber.

230 Mrs. Virginia B. Gregory:

Cross Examination by Mr. Lynch:

237 Q. Let us take the year 1939. Give us an estimate of the approximate number of times that you had been in the apartment. A. Well, I couldn't tell you the exact number of times that I had been there.

Q. All I want to know, Mrs. Gregory, is, would it be half a dozen times or two dozen times or maybe ten times? A. I would say three or four times.

Q. On those occasions did you just sit around and talk, or would it be on a matter of business? A. No. I think I went there once to see about some papering. And I went there, I believe, one time after Mrs. Varner had come from the hospital, I went there to see about something—I don't know what it was—and I talked to her a few minutes and asked her how she was feeling.

Q. Any other occasions, Mrs. Gregory, that you can tell us about? A. I don't remember any.

Q. So that your visits were on business as resident manager; is that right? A. Absolutely. During that time, yes.

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238 Q. You can't say one way or the other? A. No.

Q. You may or may not have been in there? A. Yes.

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243 Q. What is his name? A. I don't know.

Q. Did he come from Vito's? A. Yes.

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244 Q. He wouldn't be able to get there on Friday?
A. No.

Q. Did you call for the Varner apartment? A. I don't recall what I called for.

Q. But in any event was it one or two men who were there in the furnace room? A. I don't remember.

245 Q. Ma'am? A. I don't remember whether it was one or two.

Q. Did you go down there, Mrs. Gregory, and see them working? A. I don't know whether I saw the furnace man. I saw him when he came there, when they came to work—

Q. I am asking you whether you went in the furnace room and saw them there or not. A. I don't know whether I did or not.

Q. Didn't you say, ma'am, that the reason you didn't ask them to go to the Varner apartment was because they were dirty and filthy because they were working in the furnace room? A. That is what they tell me.

Q. That is what they tell you? You don't know? A. I have seen them all dirty.

Q. Did you see them dirty from the work they were doing in the furnace room? A. I don't know whether I did or not.

* * * * *

Q. Where were they working? In the furnace room?

246 A. They were finishing—no—

Q. Where were they? A. They were the ones that finished up the apartment for the Varners and then went—

Q. Were they in apartment 2? A. They went to apartment 2 after they went to Varner's apartment.

Q. How many were there in apartment 2? A. I think there were two that morning.

Q. Were there two on Thursday working in apartment 2? A. I think so.

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Q. Did you go in there yourself on Monday? A. What?

Q. Did you go in there yourself on Monday? A. No.

Q. Did you go in there Tuesday or Wednesday? A. No.

Q. How long after the accident did you go in there, Mrs. Gregory? A. I don't think that I went in there at all.

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247 By Mr. Lynch:

Q. Now, on Friday, when you say that Branham came to you again and told you that Mrs. Varner had again complained about the spigots, you didn't personally go there yourself to investigate? A. No. I didn't think it was necessary.

Q. Not whether it was necessary. You didn't do that, did you, Mrs. Gregory? A. No.

Q. Have you talked to anyone about this case, Mrs. Gregory? A. No.

Mr. Lynch: That is all.

RE-DIRECT EXAMINATION by Mr. Arth:

Q. Mrs. Gregory, when you say you didn't talk to anybody, you did talk to me about it? A. You, but I mean anyone outside of that.

RE-CROSS EXAMINATION by Mr. Lynch:

Q. Mrs. Gregory, do you remember talking to me about the case? A. Yes. Now, in court.

267 **Albert Rhodes:**

Direct Examination by Mr. Arth:

Q. Did you see this part at all (indicating)? A. No, sir.

Q. This is the only part that you saw (indicating)? A. That is all.

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277 Mr. Lynch: I object to that, if your Honor please. That is not shown to be precisely the same type of spigot and the same handle or whether or not there was the same kind of crack in it, whether or not the
278 valve had recently been fixed on this, or whether some other thing may have been done to it.

Mr. Arth: But this—

Mr. Lynch: Just a minute, Mr. Arth. I submit, if your Honor please, that it should not be permitted under those circumstances. Your Honor knows, for instance, that an automobile may be fixed or any other device may be fixed and repaired so that it will break.

The Court: Oh, I know that and the jury knows that. They know that it is not the handle that is in evidence. But it is illustrative of this witness' testimony. I will permit it as an example. Go ahead.

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279 A Juror: May I see that photograph for just a moment?

(The photograph, Defendant's Exhibit I, was handed to the jury.)

The Court: May I suggest that counsel explain that when the plaintiff was testifying he said he was sitting on the commode and the bath tub was so that he could reach it.

A Juror: I am trying to get that relative position.

The Court: I think that if you would come this way and let me illustrate, I think it would help. Let us assume that this (indicating) is the bath tub.

By the Court:

Q. This would be struck in about like this (indicating), wouldn't it? A. It wouldn't be standing up like that. In other words, it would be like this (indicating).

Q. Put it like you had it. Hold it there right now. Let us get that. A. The commode would be over this way, where you are standing.

Q. The commode was supposed to be where you are seated. A. No. Where you are standing.

Mr. Arth: There is a picture of this room (handing the witness Defendant's Exhibit I).

280 Mr. Lynch: Here is the way it is. Just like that (indicating).

The Witness: If I could be sitting on the commode.

Mr. Lynch: And the bath tub is here (indicating).

The Witness: I am on the commode.

Mr. Lynch: And the bath tub is here (indicating).

The Witness: Yes.

The Court: Sitting on the commode. That is what I wanted to get at.

The Witness: That is right.

The Court: Take that and hold it there. Here is the tub over here and here is where he reaches out. Isn't that it?

Mr. Lynch: Yes, that is it.

(Mr. Lynch handed the fixture to the jury again.)

Mr. Lynch: Take it with your right hand.

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283 CROSS EXAMINATION by Mr. Lynch:

Q. Mr. Rhodes, you have replaced and repaired those types of handles many times, haven't you? A. Yes, sir.

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286 By Mr. Lynch:

Q. The fixture that is on there now, this which has been marked "Defendant's Exhibit 1"—that is a metal spigot? A. Yes. That is a different type of spigot altogether.

Q. Was the entire piece put in, a whole new piece? A. The whole new thing that you have in your hand would have to be taken out in order to put this in.

Q. How much does one of those spigots cost?

Mr. Arth: I object.

A. What do you mean?

287 Mr. Lynch: Do you object to that?

The Court: Go ahead. Answer the question.

The Witness: What do you mean? To buy it or to install it?

The Court: Let him do it. Let him undertake to qualify the witness, and see if he is an expert.

Mr. Arth: That is all right.

By Mr. Lynch:

Q. How much would you charge to put in a new spigot like that in a bath tub? A. Approximately ten dollars.

Q. Did the spigot that was on there when you were there have these porcelain tops? A. Yes, sir.

Q. I understood you to say that you had repaired or replaced thousands of those in your experience as a plumber?

A. Yes, sir.

Q. I will ask you this question: From a layman's
288 standpoint, not from a plumber's standpoint, but
from a layman's standpoint, aren't there two— A.

Do you want the handle?

Q. What kind is that? A. That is a Fuller handle.

Q. What kind of a handle? A. Just a little Fuller ball
cap.

Q. Aren't there two packings or two caps in there? A.
There is two washers.

Q. Two washers? A. Cold water and hot water.

Q. Let us take the hot water. Are there two types of
washers in each branch? A. A gasket and a washer.

Q. And the gasket is a different type washer? A. That
is right.

Q. I understand that this is not the same type at all (in-
dicating faucet that had been brought from the Judge's
chambers)? A. That is right.

Q. That is a different type entirely? A. That is
right.

289 Q. The purpose of having a washer is that when
you turn the handle, it lets the water in and shuts it
off? A. That is right.

Q. Now, when you speak of a person putting on a new
washer, if you were putting on this spigot, he would be fac-
ing you now, wouldn't he? A. That is right.

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Q. But this is the same type? One thing comes against
another and closes and opens it? A. That is right.

Q. That comes up and the other comes down? A. Yes.

Q. But the purpose is the same? A. Yes.

Q. Now, this is either a composition or hard rubber,
isn't it, this washer, some kind of material? A. That is
right.

290 Q. It isn't an iron washer? A. No.

Q. Now, inside here—I forget the word that you termed it—inside here between the head or the top of this spigot is a flat arm, and that goes out to the handle, and there is also a packing in there, isn't there? A. That is right.

Q. And that top is packed with what? A. Graphite.

Q. What do you call that? Graphite is a material. A. That is right.

Q. But do you call that a washer also? A. No. Packing.

Q. A packing? A. That is right.

Q. If that packing were not there, it would cause leaking there? A. No. It would leak through the handle.

Q. Leak through the handle? Leak down the handle? A. Only when it is running.

Q. Only when it is running? A. Yes.

Q. And this type spigot or the one in that apartment had also that packing? A. Yes.

291 Q. Whether it was of the same precise type or not? A. That is right.

Q. Now, again, the seat of this valve is right here (indicating), isn't it? A. That is right, on that one.

Q. Yes. And on this other one— A. —it would be at the bottom down here (indicating).

Q. Would be at the bottom, where it comes down against it? A. That is right. At the bottom.

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292 Q. Then ultimately you finally grind that seat down so much that when you get through with that, it is worn thin, and then you have to put on a whole new seat on the faucet? A. We never grind it that low.

Q. No, but when you do— A. A plumber knows better. He would never grind it that much.

Q. Do you ever have to put on a new faucet? A. Yes, sir.

Q. Do you have to do that because the seat does not shut off? A. No. When it does that, it is pitted all through the seat. You never grind it out.

Q. Can't you grind it so that it gets where you can't seat it on the spigot? A. No. You are wrong there. The only time you put on a new faucet is when the pit has gone all the way through the east.

Q. That is what I mean. A. But you don't grind it that far.

Q. I know you don't grind it that far. A. Because when you put on the grinding tool, you can tell.

Q. When you put on the grinding tool, you know
293 that it is too far gone, and you would not grind it?

A. You would know that you need to put on a new spigot.

Q. That is right. Take that off and put on a new spigot? A. Yes.

Q. Now, Mr. Rhodes, on the 23rd of October, 1939, you were at that apartment, weren't you (showing a paper to the witness)? A. That is right.

Q. At apartment No. 4? A. No. 4. That is right.

Q. You reseated the— A. You can't tell that.

Q. Wait a minute. Let us see. A. Repairing bath tubs. Come down a little lower.

Q. All right. "Repairing spigots at bath tub, apartment 4." A. That is right.

Q. And cleaning the basement? A. The circulating line.

Q. Didn't you say on direct examination that you reseated— A. I told you that I didn't recall that time for sure.

Q. But you did reseat that— A. Absolutely.

294 That is where? In the bath tubs? A. Absolutely.

Q. You were there. You started at 8 and finished at 1 o'clock? A. Not 1 o'clock.

Q. You were in apartment 5? A. Apartment 2.

Q. In apartment 5, apartment 2, and apartment 4? A. And 7.

Q. Four different apartments between 8 o'clock and 1 o'clock? A. That is right.

Q. You did all that work? A. That is right.

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295 Q. "Pick up valve at Schafers on ticket No. F-7193." A. That is the ticket.

296 Q. They were there at the apartment on that date? A. Yes.

Q. Casey was a regular plumber, wasn't he? A. That is right.

Q. And he would know how to fix a valve on a spigot, wouldn't he? A. Oh, yes.

Q. Sure he would. And when you install a Klixon valve—K-l-i-x-o-n—that is the way you spell it? A. That is right.

Q. —you take off the old valve and install a new one? A. That is a safety valve on a hot water tank.

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297 Q. Do you take that out with a shovel? A. With your hands.

Q. Then you wash your hands, don't you? A. That is right.

Q. And he was there from 12:30 to 2:30? A. He is a steamfitter, now.

Q. I say, he was there? A. That is right.

Q. Now, this steamfitter should know how to put— A. No, sir.

Q. Oh, a steamfitter could not put in a valve, could he? A. No, sir.

Q. Does a steamfitter have any tray—You have been a steamfitter, haven't you? A. Yes.

Q. How long did you practice that trade? A. I imagine four or five years. I don't know.

Q. You don't think that a steamfitter would know as much as a janitor about putting on a valve? A. I said, he is not supposed to.

Q. He may not be supposed to, but does he know as much as a janitor about putting on a valve? A. I imagine he would. An ordinary person can put on a spigot.

298 Q. Don't be too sure about that now. Now, on the 10th, Mr. Rhodes, what is that (indicating)? A. "Bost and West."

Q. They were there from 10 in the morning to 3 in the afternoon? A. That is right.

Q. Working in this apartment, weren't they? A. That is right.

Q. Have you ever seen a broken handle before the day that you saw this one? A. Lots of them. Yes, sir.

Q. Don't you also know, Mr. Rhodes, that the reason that the plumbing trade business went to metal handles was because there were lots of them—

Mr. Arth: What is that question?

By Mr. Lynch:

Q. (continuing)—there were lots of those broken handles, and they went to metal handles? A. I think you are wrong there.

Q. All right. A. There are still lots of porcelain handles today.

Q. But they switched almost completely from porcelain to metal, didn't they? A. That is right.

Q. When they put on that—You didn't put this
299 on, did you (indicating)? A. No, sir.

Q. Do you know whether Mr. Vito put this on?
A. I imagine he did.

Q. He did furnish one, didn't he? A. Absolutely he did.

Q. Do you see more than one spot of blood on there now, Mr. Rhodes (handing the witness Plaintiff's Exhibit 2)? A. Well, it is hard to say whether it is blood now. It is very faint there. But, as I said, it was very plain.

Q. There is one spot of blood? A. That is right.

Q. Where is it? A. Here (indicating).

Q. At the top, near where the end of the iron appears? A. That is right.

Q. There is one spot. There is no other spot of blood on there? A. No.

Q. This one right here (indicating) is the one which was on there, that is in two pieces now, the one that was not broken a few minutes ago; isn't that right? A. Yes.

Q. And as you look at that, it appears to be clean
300 all the way through, doesn't it? A. If you look at this here (indicating) you see that it is cracked.

Q. You can't see where it is cracked up there (indicating), can you? A. Oh, absolutely.

Q. You can? This doesn't show any dirty marks as being cracked up here through the "Hot," the word "hot"? It doesn't show that it has been cracked up through here? Look at both sides. A. It looks more like dirt all over this.

Q. Does that look like an open crack (indicating)? Could that be cracked? A. Well, no.

Q. That couldn't be a crack? A. No.

Q. Sure of that? A. Sure.

Mr. Lynch: That is all I want to ask.

The Witness: I remember particularly that when I took that, the lady told me about the gentleman cutting, or something cutting his hand. She said he cut his hand, and I paid particular attention to that.

By Mr. Lynch:

Q. Mrs. Gregory didn't ask you about that? A. Mrs. Gregory? I don't know Mrs. Gregory. Who is she?

301 Q. The lady sitting right there (indicating). A. I know her as the resident manager. That is all.

Q. You know who she is, don't you? A. Yes. She is the resident manager.

Q. She didn't ask you to look at it carefully? A. No, sir.

Q. And nobody else did? A. The lady of the apartment—No. Nobody asked me to. No, sir.

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302 Q. Certainly it would. And it has the effect—
Mr. Arth: Wait a minute. Let the witness answer. Don't argue.

Mr. Lynch: Thank you, Mr. Arth. I won't do it again.

